INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE AERIAL INCIDENT OF 3 JULY 1988

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES
OF AMERICA)

VOLUME I

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE L'INCIDENT AÉRIEN DU 3 JUILLET 1988

(RÉPUBLIQUE ISLAMIQUE D'IRAN *c.* ÉTATS-UNIS
D'AMÉRIQUE)

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VOLUME I

IMPRIMÉ EN FRANCE
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The case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*, entered on the Court's General List on 17 May 1989 under Number 79, was removed from the List by an Order of the Court of 22 February 1996, following discontinuance by agreement of the Parties *(Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), I.C.J. Reports 1996*, p. 9).

The pleadings in the case are being published in the following order:

Volume I. Application instituting proceedings of the Islamic Republic of Iran; Memorial of the Islamic Republic of Iran.

Volume II. Preliminary objections of the United States of America; Observations and submissions of the Islamic Republic of Iran on the preliminary objections; Observations of the International Civil Aviation Organization; selection of correspondence; Settlement Agreement.

*

Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

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The Hague, 2000.

L'affaire de l'*Incident aérien du 3 juillet 1988 (République islamique d'Iran* c. *Etats-Unis d'Amérique)*, inscrite au rôle général de la Cour sous le numéro 79 le 17 mai 1989, en a été rayée par ordonnance de la Cour du 22 février 1996 à la suite du désistement par accord des Parties *(Incident aérien du 3 juillet 1988 (République islamique d'Iran* c. *Etats-Unis d'Amérique), C.I.J. Recueil 1996*, p. 9).

Les pièces de procédure écrite relatives à cette affaire sont publiées dans l'ordre suivant:

Volume I. Requête introductive d'instance de la République islamique d'Iran; mémoire de la République islamique d'Iran.

Volume II. Exceptions préliminaires des Etats-Unis d'Amérique ; observations et conclusions de la République islamique d'Iran sur les exceptions préliminaires ; observations de l'Organisation de l'aviation civile internationale ; choix de correspondance ; arrangement amiable.

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La Haye, 2000.

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APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE ISLAMIC REPUBLIC OF IRAN

REQUÊTE INTRODUCTIVE D'INSTANCE PRÉSENTÉE PAR LA RÉPUBLIQUE ISLAMIQUE D'IRAN

I. THE AGENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

EMBASSY OF THE ISLAMIC
REPUBLIC OF IRAN

Agent Bureau
The Hague

IN THE NAME OF GOD

17 May 1989.

On behalf of the Government of the Islamic Republic of Iran, and in accordance with Article 40, paragraph 1, of the Statute of the Court, I have the honour to notify the Court that the Islamic Republic wishes to initiate proceedings against the United States of America. The Islamic Republic requests that this Court determine on appeal from the decision rendered on 17 March 1989 by the Council of the International Civil Aviation Organization whether the United States has violated the Convention on International Civil Aviation and, independently, whether the United States has violated the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, through the United States actions with respect to the shooting down of an Iranian commercial airliner, and, if so, the amount of compensation due. The facts and contentions at issue in this proceeding are detailed in the Application attached hereto.

In accordance with Article 40 of the Rules of the Court, the Government of the Islamic Republic of Iran wishes to inform the Court that its Agent will be the undersigned.

The address for service to the Agent for the Islamic Republic of Iran is: Agent Bureau of the Embassy of the Islamic Republic of Iran to the Netherlands, Waldeck Pyrmontkade 872, 2518 JS The Hague.

(Signed) Mohammad K. ESHRAGH.

The authority and signature of Mr. Mohammad K. Eshragh to institute the present proceedings on behalf of the Government of the Islamic Republic of Iran is hereby authenticated.

(Signed) Mohammad T. MOAYED,
Ambassador
of the Islamic Republic of Iran
to the Netherlands.

II. APPLICATION INSTITUTING PROCEEDINGS

IN HIS EXALTED NAME

I have the honour to refer to Articles 36 (1) and 37 of the Statute of the Court and Article 84 of the Convention on International Civil Aviation of 1944 as amended ("Chicago Convention") in order to appeal from the decision rendered on 17 March 1989 by the Council of the International Civil Aviation Organization. I also refer to Article 14 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 ("Montreal Convention"). The Islamic Republic and the United States are parties to both Conventions. Under the jurisdiction thereby conferred upon the Court, I hereby submit, in accordance with Article 40 (1) of the Statute and Article 38 of the Rules of Court, the Application instituting proceedings in the name of the Government of the Islamic Republic of Iran against the Government of the United States of America in this case.

I. STATEMENT OF FACTS

This dispute arises from the destruction of an Iranian aircraft, Iran Air Airbus A-300B, flight 655, and the killing of its 290 passengers and crew by two surface-to-air missiles launched from the USS *Vincennes*, a guided-missile cruiser on duty with the United States Persian Gulf/Middle East Force in the Iranian airspace over the Islamic Republic's territorial waters in the Persian Gulf on 3 July 1988. The civil passenger aircraft, while in the course of a regularly-scheduled international commercial flight, and while operating within its previously prescribed and published time and course patterns, was intercepted and destroyed, within its own national airspace over its own national territorial waters, by two missiles fired by the United States warship that had positioned itself in the Iranian territorial waters.

II. JURISDICTION OF THE COURT

As Members of the United Nations, the United States and the Islamic Republic are parties to the Statute of the Court, Article 36 (1) of which provides that "The jurisdiction of the Court comprises . . . all matters specifically provided for . . . in treaties and conventions in force." The two countries are parties to both the Chicago Convention of 1944 (15 *UNTS* 295) as amended and the Montreal Convention of 1971. The Chicago Convention to which 150 States are parties was ratified by the United States on 9 August 1946 and by Iran on 19 April 1950. The Montreal Convention to which 128 States are parties was ratified by the United States on 26 January 1973 and by Iran on 10 July 1973. Both Conventions have been in force with respect to the two countries during the period relevant in this case.

The Chicago Convention, Chapter XVIII on disputes and default, Article 84, provides that:

> "*Settlement of disputes*
>
> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

Immediately after this flagrant violation of the principles enshrined in the Chicago Convention took place, the Islamic Republic referred to the ICAO Council and in its final submission before the Council it sought:

> "1. Condemnation of the shooting down of IR 655 by the United States military forces in the Persian Gulf.
>
> 2. Explicit recognition of a crime of international character relating to the breach of international law and legal duties of [the United States as] a Contracting State of ICAO.
>
> 3. Explicit recognition of the responsibilities of the United States Government, and calling for effecting compensation for moral and financial damages.
>
> 4. Demand for the immediate termination of present obstacles, restrictions, threats, and the use of force against civilian aircraft in the region, including Council's appeal to relevant international bodies to demand the withdrawal of all foreign forces from the Persian Gulf."

The ICAO Council, however, pursuant to its decision of 17 March 1989, in effect dismissed all Iranian requests and limited itself to the following and a number of general observations not relevant to those requests:

> "*Deeply deplores* the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives" (italics as in original: cf. Attachment).

The Montreal Convention, Article 14 (1), provides that:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

In the circumstances which are described above and which the Government of the Islamic Republic will set out more fully in its Memorial and subsequent written and oral pleadings, there exists a dispute between the Government of the United States and the Government of the Islamic Republic concerning the interpretation and application of the Chicago Convention and the Montreal Convention. The Islamic Republic contends that the action of the United States with respect to Iran Air flight 655 has violated certain provisions of the Chicago and Montreal Conventions. The Government of the United States has denied this contention. Since 3 July 1988, the date the aircraft was destroyed and thereby 290 lives were taken, efforts to resolve the dispute have been unsuccessful *.

III. THE CONTENTIONS OF THE ISLAMIC REPUBLIC

The Government of the Islamic Republic contends that, by its destruction of Iran Air flight 655 and taking 290 lives, its refusal to compensate the Islamic Republic for damages arising from the loss of the aircraft and individuals on board and its continuous interference with the Persian Gulf aviation, the Government of the United States has violated the Chicago and Montreal Conventions and that the ICAO Council has erred in its decision of 17 March 1989. In particular, the Islamic Republic contends that:

(a) the ICAO Council decision was erroneous in that the Government of the United States' destruction of IR 655 and taking of 290 lives has indeed violated the Preamble and Articles 1, 2, 3 *bis* and 44 *(a)* and *(h)* of the Chicago Convention;

(b) the ICAO Council decision was in error also because the continuation of the United States interferences with the Persian Gulf aviation violated Annex 15 of the Chicago Convention and Recommendation 2.6/1 of the Third Middle East Regional Air Navigation (MID RAN) Meeting of ICAO;

(c) by refusing to accept liability for the actions of its agents in destruction of IR 655, and by failing to pay compensation for the aircraft, or to work out with the Islamic Republic a proper mechanism for determination and payment of damages due to the bereaved families, the United States has violated Articles 1, 3 and 10 (1) of the Montreal Convention.

IV. JUDGMENT REQUESTED

Accordingly, while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, the Islamic Republic requests the Court to adjudge and declare as follows:

(a) that the ICAO Council decision is erroneous in that the Government of the United States has violated the Chicago Convention, including the Preamble, Articles 1, 2, 3 *bis* and 44 *(a)* and *(h)* and Annex 15 of the Chicago Convention as well as Recommendation 2.6/1 of the Third Middle East Regional Air Navigation Meeting of ICAO;

(b) that the Government of the United States has violated Articles 1, 3 and 10(1) of the Montreal Convention; and

(c) that the Government of the United States is responsible to pay compensation to the Islamic Republic, in the amount to be determined by the Court, as measured by the injuries suffered by the Islamic Republic and the bereaved families as a result of these violations, including additional financial losses which Iran Air and the bereaved families have suffered for the disruption of their activities.

---

* The Islamic Republic of Iran submits that under the circumstances and in particular the United States total refusal of all voluntary methods of pacific settlement of the present dispute, the arbitration referred to in Article 14 (1) of the Montreal Convention cannot be considered as a viable course of action.

The Government of the Islamic Republic has designated the undersigned as its Agent for the purposes of these proceedings. All communications relating to this case should be sent to the Agent Bureau of the Embassy of the Islamic Republic of Iran, The Hague, Waldeck Pyrmontkade 872.

Respectfully submitted,

(Signed) Mohammad K. ESHRAGH,
Agent of the Government
of the Islamic Republic of Iran.

Attachment

ICAO News Release (PIO 4/89)

DECISION TAKEN BY ICAO COUNCIL ON IR 655 TRAGEDY

Montreal, 17 March 1989. — The ICAO Council today adopted the following resolution :

The ICAO Council,

Recalling its decisions of 14 July and 7 December 1988 concerning the shooting down, on 3 July 1988, of Iran Air Airbus 300 on flight IR 655 by a warship of the United States ;

Having considered the report of the fact-finding investigation instituted by the Secretary General pursuant to the decision of the Council of 14 July 1988 and the subsequent study by the Air Navigation Commission of the safety recommendations presented in that report ;

Expressing appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned ;

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight ;

Reaffirming its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations ;

Deeply deplores the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives ;

Expresses again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families ;

Appeals again urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* * into the Convention on International Civil Aviation ;

Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein ;

Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft.

---

* Approved by the 25th Session (Extraordinary) of the ICAO Assembly in May 1984 as an Amendment to the Chicago Convention, Article 3 *bis* states in part : "*(a)* The Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight . . ."

MEMORIAL OF THE ISLAMIC REPUBLIC OF IRAN

MÉMOIRE DE LA RÉPUBLIQUE ISLAMIQUE D'IRAN

IN THE NAME OF GOD

MEMORIAL
SUBMITTED BY THE
ISLAMIC REPUBLIC OF IRAN

INTRODUCTION

1. This Memorial is filed pursuant to the Orders of the Court dated 13 December 1989 and 12 June 1990 fixing 24 July 1990 as the time-limit for the filing of the Memorial of the Islamic Republic of Iran (herein referred to as the "Islamic Republic"). The Order was made having regard to Article 48 of the Statute of the Court and taking into account the Application filed by the Islamic Republic on 17 May 1989 instituting proceedings against the United States of America (herein referred to as the "United States").

2. This case arises from the destruction of a civilian aircraft - Iran Air Airbus A300, registration number EP-IBU, operating as flight IR 655 between Bandar Abbas and Dubai (herein referred to as "IR 655") - while flying in the Islamic Republic's airspace and over its internal and territorial waters in the Persian Gulf and the killing of its 290 passengers and crew by two surface-to-air missiles launched by the guided missile cruiser, USS Vincennes, on the morning of Sunday, 3 July 1988. The position at which IR 655 was destroyed in relation to the Persian Gulf is shown on Figure 1.

3. It will be shown in this Memorial that the use of force by U.S. naval units in destroying IR 655 and the killing of its passengers and crew violated the most fundamental principles of international law, including specific provisions of the Chicago Convention[1] and the Montreal Convention[2] which govern and protect international civil aviation. The shooting down of the aircraft also violated Article 2(4) of the United Nations Charter and rules of customary international law prohibiting the use of force. In unlawfully intruding into the Islamic Republic's internal and territorial waters, in breaching its stated neutrality in the area, in endangering civil aviation generally and in destroying the aircraft, the United States also violated the Islamic Republic's sovereignty and the principle of non-intervention as well as the principles of neutrality enshrined in the Hague Conventions of 1907. All of these actions were in breach of the Treaty of Amity, Economic Relations and Consular Rights between the United

---

[1] Convention on International Civil Aviation of 1944 as amended (15 UNTS 295). A copy of this Convention together with Annexes 2, 11 and 15 and the 1984 Montreal Protocol (Article 3 *bis*) is attached at Exhibit 1.

[2] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971. A copy of this Convention is attached at Exhibit 2.

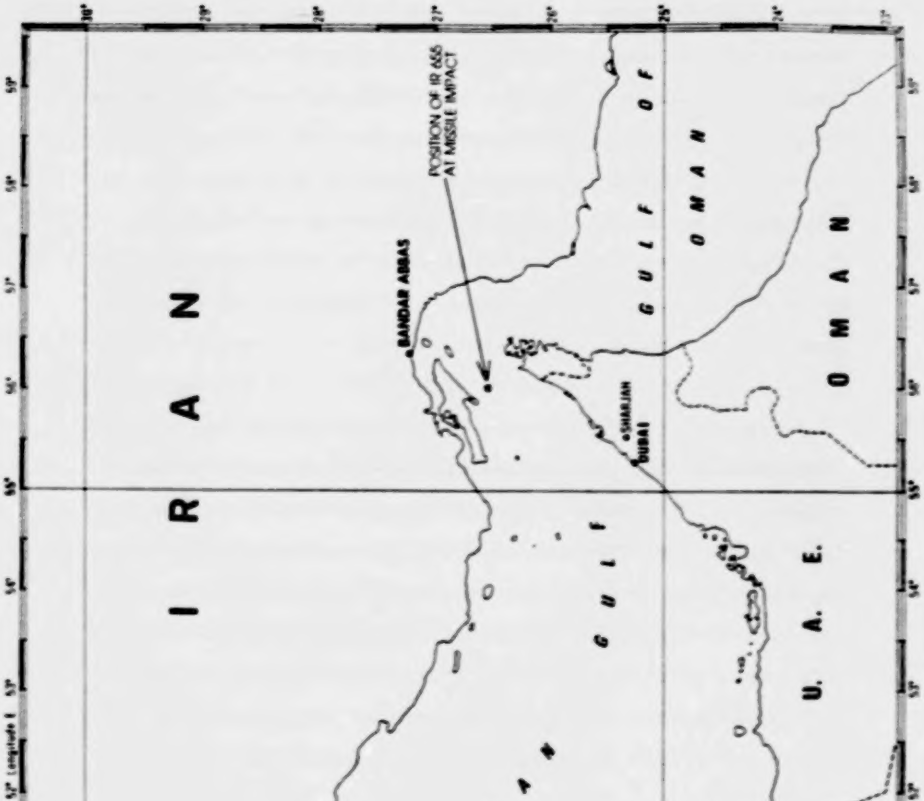
I R A N
I R A Q
K U W A Y T
A R A B I Y A H
A S S A U D I Y A H
P E R S I A N G U L F
G U L F O F O M A N
O M A N
U. A. E.
Q A T A R
BAHRAYN
BANDAR ABBAS
SHARJAH
DUBAI
POSITION OF IR 655 AT MISSILE IMPACT
POSITION OF IR 655 AT MISSILE IMPACT
SPECIALLY PREPARED FOR PRESENTATION TO ICJ
Longitude E
Latitude N
47°
48°
49°
50°
51°
52°
53°
54°
55°
56°
57°
58°
59°
30°
29°
28°
27°
26°
25°
24°
23°

Figure 1

States and Iran[1], customary practice and rules relating to the Law of the Sea, including those reflected in the 1958 Geneva Conventions on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea, as well as the provisions of Chapter VII of the United Nations Charter. This case also involves a flagrant violation of the principle of non-interference in the affairs of a sovereign State and of elementary principles of humanity and norms of international behaviour.

4. Despite these numerous violations of international law, the United States has refused to accept responsibility. Moreover, since the incident on 3 July 1988, the United States has continued to provoke the Islamic Republic by the presence of its fleet in the Persian Gulf and to endanger civil aviation by threatening civil aircraft on a number of specific occasions. In short, the United States has taken no steps to ensure that an incident such as the shooting down of IR 655 will not happen again.

---

[1] Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran signed at Tehran on 15 August 1955 and entered into force on 16 June 1957 (284 UNTS 93, II Recueil des Traités Bilatéraux 69, 8 U.S.T. 899, T.I.A.S. No. 3853). A copy of this Treaty, herein referred to as the "Treaty of Amity", is attached at Exhibit 3.

5. Such indifference is unacceptable, even more so when it is recalled that the United States has been the most vocal State in condemning the use of armed force on a number of the other well-known occasions where civil aircraft have been shot down, and in insisting on the requirement that States concerned make reparation and guarantee that similar incidents will not be repeated.

6. This case is more abhorrent and unjustifiable than those other incidents that the United States so publicly condemned. Those incidents all involved the use of force against an aircraft which had intruded into the territorial airspace of the attacking State. In this case, not only was IR 655 over the Islamic Republic's own internal and territorial waters and hence in the Islamic Republic's airspace when it was shot down, but it was fired on by the USS Vincennes which, operating far from its own shores, had intruded into and had positioned itself within the Islamic Republic's territorial sea.

7. Immediately after the incident, the Islamic Republic referred the matter to the Council of the International Civil Aviation Organization (the "ICAO Council"). Although on previous occasions the ICAO Council had condemned the actions of members who had shot down civil aircraft, it took no such action in this case. It is partly

as a result of this unequal treatment that the Islamic Republic has been compelled to file its Application as an appeal from the ICAO decision under Article 84 of the Chicago Convention. In addition, the Islamic Republic applies independently to the Court under Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity.

8. Pursuant to Article 49 of the Rules of Court, this Memorial is divided into the following parts:

- Part I contains a statement of the facts relating to the incident and the attempts by the United States to deny responsibility.

- Part II contains a discussion of the jurisdiction of the Court to hear the case.

- Part III contains a statement of the applicable law.

- Part IV contains an analysis of the relevant principles and rules of law as applied to the facts.

- Part V contains a discussion of the relevant principles of reparation.

- The Memorial concludes by setting forth the submissions of the Islamic Republic to the Court.

9. A number of documentary exhibits and other evidentiary materials are being furnished with this Memorial. These are included in Volumes II and III hereto.

PART I

THE FACTS

A. Introduction

1.01 IR 655 was shot down at 0654:43 on the morning of Sunday, 3 July 1988, seven minutes after take-off on a regularly scheduled commercial flight between Bandar Abbas and Dubai.

1.02 In all respects the flight was proceeding normally. The weather was clear. The captain had assumed a normal flight pattern, climbing after take-off toward his assigned altitude of 14,000 feet within the designated international air corridor. He was engaging in routine radio communications with air traffic control units, and the plane's transponder was transmitting ("squawking") its assigned Mode III (commercial aircraft) code of 6760[1]. Just eleven seconds after IR 655 sent its last radio message, the Vincennes launched its missiles which destroyed the plane and killed all those on board.

---

[1] Under Annex 10 of the Chicago Convention, international civilian aircraft must transmit a coded pulse of energy that can be picked up on secondary surveillance radar ("SSR"). This code consists of four digits which are set by the crew before take-off. Mode III is the form of code used by commercial aircraft. Mode II is only used by military aircraft.

1.03 The facts of this case are shocking. They reveal serious violations of international law by the United States for which it has refused to accept responsibility. As the following discussion will demonstrate, there is no excuse whatsoever for the United States' conduct. A State must be held accountable for actions of this kind, and it is unacceptable that the shooting down of a civilian aircraft in the circumstances discussed below should be dismissed as a mere accident. This action is an international crime. Indeed, the United States itself, in other incidents involving the shooting down of civilian aircraft, has repeatedly described such actions as international crimes for which the States concerned bear full legal responsibility.

1.04 The factual presentation below is based in large part on the Report of the ICAO Fact-Finding Investigation issued in November 1988 (herein referred to as the "ICAO Report")[1]. While ICAO did carry out an investigation of the incident, substantial parts of the ICAO Report are based on information contained in a report unilaterally prepared by the United States' Department of Defense and issued on 28 July 1988 (the "Defense Department

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[1] A copy of the ICAO Report is attached at Exhibit 4.

Report")[1], most of which was not, or could not be, corroborated by the ICAO investigation team. It is important for the Court to bear this in mind and to place in their proper context some of the statements contained in the ICAO Report when it comes to assess their probative value.

1.05 The Defense Department Report made public and given to ICAO by the United States was the "declassified" version of the Report. As a result, there are hundreds of deletions in the text. While some of these deletions clearly cover the names of individuals, others cover a good number of paragraphs. The extent of these deletions, especially where critical aspects of the incident are being discussed, suggests that there were other motives at work. Such a selective presentation of the facts generally calls into question the value of such a report and a party's good faith in preparing it. Unfortunately, the ICAO Report contains no reservations about the Defense Department Report. Indeed, it adopts, usually without attribution, a large number of the political statements, allegations of fact and conclusions taken directly from the Defense Department Report.

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[1] **Appendix E of the ICAO Report. References to the Defense Department Report in this Memorial relate to the page numbers in Appendix E of the ICAO Report.**

1.06 It is partly for these reasons that the Islamic Republic disagrees with a number of the "facts", "findings" and "conclusions" set out in the ICAO Report. For clarity of exposition, the Islamic Republic has set out in detail its differences with the ICAO Report in a separate Appendix at the end of this Memorial. Nevertheless, in the presentation below, the ICAO Report is adopted for reference purposes, as it contains most of the essential facts and is the only "independent" source presently existing for such facts. Although it is referred to below in order to minimize the areas of potential dispute (the United States has not taken issue with any of the conclusions reached therein), where necessary the position of the Islamic Republic on the ICAO Report will be noted.

B. The Background Facts Relating to IR 655

1. IR 655 Was a Scheduled Flight Within the Internationally Designated Civil Air Corridor

1.07 On Sunday, 3 July 1988, IR 655 originated in Tehran (as flight IR 451) for the first of a four-sector flight plan. The plane - an Iranian registered Airbus owned and operated by Iran Air (the Airline of the Islamic Republic of Iran) - was scheduled to fly the following routes:

Flight	Route	Scheduled time (UTC)[1]
IR451	Tehran - Bandar Abbas	0330 - 0520
IR655	Bandar Abbas - Dubai	0620 - 0715
IR654	Dubai - Bandar Abbas	0815 - 0910
IR452	Bandar Abbas - Tehran	1010 - 1200

1.08 The flight from Tehran to Bandar Abbas was uneventful and the plane landed at 0510 hours. A turn-around check was carried out on the plane while the crew remained on the aircraft, and no discrepancies were found or maintenance carried out. IR 655 then prepared for the next leg of its trip from Bandar Abbas to Dubai. The flight plan had already been filed in Tehran and Dubai was duly informed[2].

1.09 The Bandar Abbas - Dubai sector was part of a regular passenger service that Iran Air had operated for over twenty years using the international air corridor, ATS route A59 (Air Traffic System Amber 59). This flight was ordinarily operated twice a week, on Tuesdays and Sundays, with the exception of Sunday, 19 June[3].

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[1] ICAO Report, para. 1.1.1. These times are recorded on the basis of Co-ordinated Universal Time (UTC). On 3 July 1988, local time in the Islamic Republic was 3 hours 30 minutes ahead of UTC and local time in the United Arab Emirates was 4 hours ahead of UTC. In order to avoid confusion, all times referred to in this Memorial are UTC unless specifically stated otherwise.

[2] Ibid., paras. 1.1.1-1.1.3.

[3] Ibid., para. 2.4.1.

1.10 The position of route A59 together with the location of IR 655 when it was hit are depicted on Figure 2 which is a map of the relevant area of the Persian Gulf. As can be seen, the route lies just northeast of the Strait of Hormuz and is twenty nautical miles wide from the Iranian mainland through the reporting point MOBET until a point roughly two-thirds of the way across the Persian Gulf known as DARAX where the Tehran FIR (Flight Information Region) ends and the Emirates FIR begins. At that point it changes into a 10-mile wide sector to Dubai. At all times on 3 July 1988, IR 655 was well within the lateral limits of airway A59[1].

1.11 Figure 2 also shows the limits of the Islamic Republic's territorial sea. Pursuant to a 1934 Act, amended in 1959, the Islamic Republic's territorial sea was fixed at a distance of 12 nautical miles. As provided by a 1973 Decree Law the 12 mile distance was measured from a series of straight baselines drawn from various points along the mainland coast and a number of islands lying close offshore. These baselines are also illustrated on Figure 2. According to the Executive Regulation to the 1934 Act,

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[1] ICAO Report, para. 3.1.9.

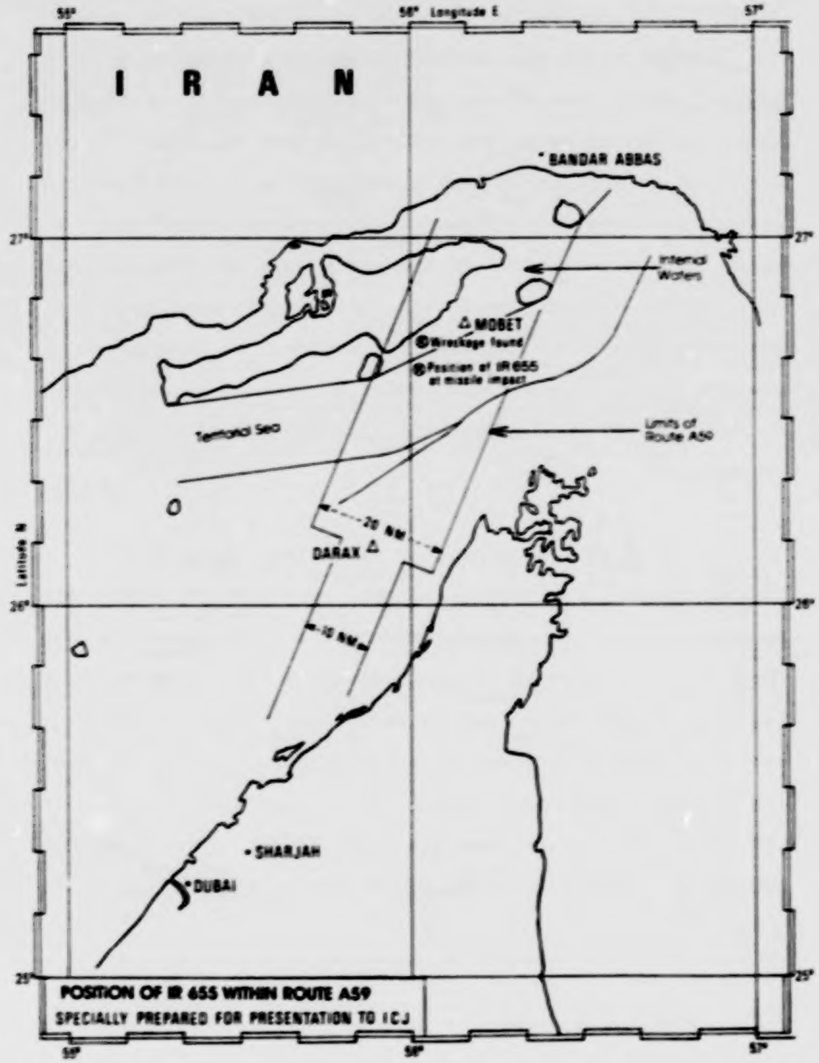
55°
56° Longitude E
57°
IRAN
BANDAR ABBAS
27°
Internal Waters
MOBET
Wreckage found
Position of IR 655 at missile impact
Territorial Sea
Limits of Route A59
20 NM
DARAX
Latitude N
26°
10 NM
SHARJAH
DUBAI
25°
POSITION OF IR 655 WITHIN ROUTE A59
SPECIALLY PREPARED FOR PRESENTATION TO ICJ

Figure 2

concerning innocent passage, foreign warships are required to obtain the approval of Iranian authorities eight days in advance of their passage through, or stop over in, the Islamic Republic's territorial waters. The Regulation also provides that at no time can there be more than two such warships in the territorial waters[1].

1.12 IR 655 was not the only flight which used route A59. As the ICAO Report indicates, there were 28 other Iran Air flights besides IR 655 between Bandar Abbas and Dubai or Bandar Abbas and Sharjah which used the same corridor during the month preceding the incident. In addition, there were seven regularly scheduled flights between Kabul and Dubai and 23 flights between Kabul and Jeddah which also used the same route[2].

1.13 The ICAO Report notes that the total volume of commercial traffic on route A59 for the period from 2 June 1988 to 3 July 1988 was 66 flights, or an average of two per day. The maximum number of flights occurred on 23 June 1988 when six flights used the route[1].

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[1] See, Exhibit 5 for the texts of the 15 July 1934 Act on the Territorial Waters and the Contiguous Zone of Iran, the 29 August 1934 Executive Regulation on Conditions of the Passage and Stop Overs of Foreign Warships in Iranian Waters and Ports, the 12 April 1959 Act Amending the Act of 15 July 1934 on the Territorial Waters and the Contiguous Zone of Iran and the 21 July 1973 Decree Law, together with translations of the same reproduced from the U.N. Legislative Series.

[2] ICAO Report, para. 2.4.1.

1.14 Delays of flight IR 655 during this period "were relatively small and these flights normally departed from the gate close to scheduled departure time[2]".

1.15 The ICAO Report states that information about commercial flights using A59 was available on board the *Vincennes*, which had the civil flight schedule current as of 28 June 1988 in its Combat Information Centre[3]. Since the published flight schedule was available and known to the *Vincennes* on the morning of 3 July 1988 just before IR 655 took off, the *Vincennes* knew that IR 655 was expected to pass over at any moment en route to Dubai, but that it had not yet done so[4]. It was the only flight due to leave

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[1] *ICAO Report*, para. 2.4.2.

[2] *Ibid*.

[3] *Ibid*., para. 2.8.3.

[4] The *Defense Department Report* is based in part on a tape of the information recorded on the ship's AEGIS radar system on the morning of 3 July 1988. This record should show clearly that no other commercial flight had passed over that morning.

Bandar Abbas across the Persian Gulf early that morning. According to the time-table available on board the Vincennes, IR 655 was scheduled to transit the Persian Gulf between 0620 and 0715. As a matter of fact, IR 655 was within this schedule when it was destroyed by the Vincennes[1].

2. Details of the Flight

(a) The Passengers and the Crew

1.16 When IR 655 left Bandar Abbas it was carrying 290 people: 274 passengers and a crew of 16. Of these 290, 254 were Iranian nationals, 13 were nationals of the United Arab Emirates, ten of India, six of Pakistan, six of Yugoslavia and one of Italy. Sixty-five of the passengers were children or infants[2].

1.17 The captain, Mohsen Rezaian, was a veteran pilot for Iran Air who had logged 7000 hours of flight time of which over 2000 hours were on an Airbus A-300. He had flown this route for the past two years. The co-pilot also had extensive flying experience as did the flight engineer. Both the captain's and co-pilot's commercial pilot licences were valid at the time as was the licence of the flight engineer[1]. The ICAO investigation team found no indication that the flight crew may not have been physically or psychologically fit at the time[2].

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[1] This is confirmed by the transcript of the pilot's communication with the Tehran air traffic control centre. See, page B-4 of Appendix B to the ICAO Report.

[2] ICAO Report, para. 1.2.1. All crew members were Iranian. A list of the passengers and crew is attached at Exhibit 6.

1.18 There were also no problems with the plane. The ICAO Report stated:

> "The aircraft was properly certificated, equipped and maintained in accordance with existing regulations and approved procedures. The aircraft was serviceable when dispatched from Bandar Abbas[3]."

It added:

> "There was no indication of failure during flight in the equipment of the aircraft including the communications and navigation equipment[4]."

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[1] *ICAO Report*, para. 1.5.

[2] *Ibid.*, para. 3.1.1.

[3] *Ibid.*, para. 3.1.2.

[4] *Ibid.*, para. 3.1.3.

(b) Routine Communications with ATC Centres

1.19 Following normal procedures, at various times throughout its flight IR 655 was in radio contact with ground stations including the Bandar Abbas tower, the regional approach centre (Bandar Abbas approach) and the Tehran air traffic control centre (Tehran ACC). Radio communications were also exchanged between IR 655 and the Iran Air station at Bandar Abbas.

1.20 These transmissions started at 0634:50 when IR 655 contacted the Bandar Abbas tower requesting start-up clearance and a cruising altitude of 14,000 feet[1]. This request was passed on to Tehran ACC at 0636:23, and Tehran in turn contacted the Emirates air traffic control centre (Emirates ACC) to request confirmation of the 14,000 feet level.

1.21 The communication between Tehran ACC and Emirates ACC is significant because IR 655's transponder code was specifically mentioned and identified. As the record shows, at 0637:04 Tehran ACC informed Emirates ACC that IR 655 would be squawking 6760 - a fact that was immediately confirmed by Emirates ACC. Those communications were all in English, were transmitted over open VHF radio frequencies and must have been heard by or known to the *Vincennes* or to its regional command[1].

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[1] Transcripts of all the radio communications referred to in these paragraphs may be found in Appendix B of the ICAO Report. Accordingly, individual references for each communication will not be given.

1.22 One minute later (0638:03), Emirates ACC approved 14,000 feet for IR 655 and this information was relayed to the Bandar Abbas approach together with the instruction that IR 655 should squawk code 6760. Bandar Abbas approach acknowledged both the flight level and the transponder code.

1.23 At 0638:06, IR 655 requested and received start-up clearance from the tower. At 0643:19, the tower called IR 655 to confirm its clearance and the following exchange ensued:

Time (UTC)	From	Communication
0643:19	BND TWR	"Iranair 655 copy your ATC clearance."
0643:24	IR 655	"Go ahead."
0643:25	BND TWR	"Iranair 655 is cleared to destination Dubai via flight planned route, climb and maintain flight level 140, (14,000 feet), after take off follow simulated MOBET 1 BRAVO departure squawking ALPHA 6760."

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[1] *See*, below, paras. 1.28-1.35.

0643:41	IR 655	"Iranair 655 cleared destination flight planned route, flight level 140, simulated MOBET 1 BRAVO and squawk 6760."
0643:53	BND TWR	"Squawk 6760 Iranair 655 that is correct, call when ready for departure."

Once again, all of these transmissions were in English and could readily have been picked up by anyone monitoring the VHF frequency.

1.24 IR 655 took off from runway 21 at 0647. The next communication from the plane was at 0649:18 when it contacted Bandar Abbas approach saying that it was passing out of 3,500 feet. The pilot also indicated that he estimated reaching MOBET at 0652, DARAX at 0658 and the destination (Dubai) at 0715. At 0651:04, IR 655 transmitted the same information to Tehran ACC and added that it was passing out of 7,000 feet to 14,000 feet.

1.25 Tehran ACC relayed IR 655's estimated arrival time at both DARAX and Dubai to Emirates ACC. Tehran ACC also requested IR 655 to report back when it had reached 14,000 feet and was passing DARAX (which IR 655 acknowledged), and asked the aircraft to confirm that it was squawking 6760. IR 655 replied affirmatively. This was at

0651:30, several minutes after the Vincennes had picked up the plane on its radar.

1.26 IR 655 then continued its normal flight pattern towards MOBET. At 0654:00, it sent its last message to Bandar Abbas approach reporting its position at MOBET and vacating 12,000 feet. Bandar Abbas approach acknowledged, and at 0654:11 IR 655 said, "thank you, good day". These were the final words heard from the flight.

1.27 When the plane was shot down at 0654:43, a matter of seconds later, it was still flying within the Islamic Republic's airspace at approximate coordinates 26°38'22"N; 56°01'24"E - well within route A59. It was ascending to its assigned altitude of 14,000 feet. And it was transmitting its commercial code 6760. The flight path of IR 655 together with its position when the missiles were launched (0654:22), when they struck (0654:43) and where the wreckage of the aircraft hit the water are depicted on Figure 3. All these positions are taken from the ICAO Report, based on information given in the Defense Department Report. This information shows that IR 655 was just over the line between the Islamic Republic's internal waters and its territorial waters when the missiles were fired. The map also shows where the wreckage of the plane was found, a point well within the Islamic Republic's internal waters.

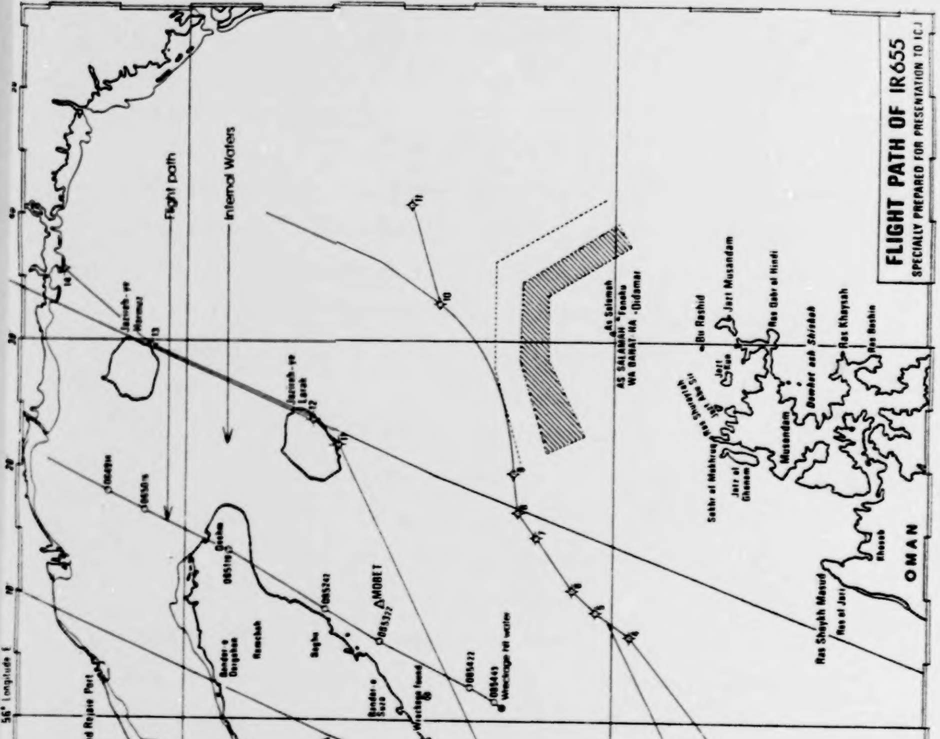
FLIGHT PATH OF IR655
SPECIALLY PREPARED FOR PRESENTATION TO I.C.J.
I R A N
O M A N
QESHM
JAZIREH-YE
Flight path
Internal Waters
Territorial Sea
Limits of Route A59
56° Longitude E
Latitude N
Shahid Rajaie Port
Jazireh-ye Hormoz
Jazireh-ye Larak
Jazireh-ye Hengam
Jazireh-ye Tonb-e Bozorg
Wreckage found
MOBET
DARAX
Ras Shaykh Masud
Ras al Jar
Ras Dabbah
Jazir Musandam
Musandam
Ras Dahr al Hindi
Ras Khaysah
As Salamah
AS SALAMAH WA BANAT HA
Bu Rashid
Jazirat al Ghanam
Khasab
Champ pétrolifère Salah
Gheshm

Figure 3

(c) U.S. Monitoring of IR 655's Routine Communications

1.28 The evidence shows that not only should the U.S. warships have been aware of IR 655's messages, which were being broadcast over open radio frequencies, but that the United States actually did have this information at the time. This is demonstrated even by examining the findings of the official investigation that the United States Government commissioned shortly after the incident.

1.29 The hearings for the United States Department of Defense investigation of the incident were concluded by 19 July 1988 and its report was issued on 28 July 1988. This was just two weeks after ICAO had ordered its own fact-finding investigation which was not completed until November 1988. Thus, the Department of Defense Report was available to ICAO in preparing its own Report. On the other hand, the Defense Department prepared its Report without knowledge of the findings that the ICAO team would reach.

1.30 These facts are relevant to the following statement that appears at paragraph 4 of page E-8 of the Defense Department Report:

> "Iran Air flight 655 took off on runway 21 (heading 210 degrees true), was directed by the

> Bandar Abbas tower to squawk IFF mode III code 6760, and began a normal climb out to assigned altitude of 14,000 feet for the flight, which lasted a total of 7 minutes before the plane was hit by the missiles from USS VINCENNES. The pilot remained within the Amber 59 air corridor (20 miles wide, 10 miles each side of centerline), made a routine position report to Bandar Abbas departure control at approximately 0654 Z, and was ascending through 12,000 feet at a speed of approximately 380 kts at the time of making his report."

1.31 It must be concluded from this that at the time the United States knew these facts either from the Vincennes itself or from other ships in the area or through its own monitoring and intelligence network. In other words, the United States had full independent knowledge of the actual radio communications that passed between IR 655 and the various air traffic control ground stations. The United States knew which runway had been used. It knew that the Bandar Abbas tower had directed the flight to squawk code 6760 on Mode III (the normal commercial aircraft mode). It knew that IR 655 was to make a normal climb within A59 to 14,000 feet. It knew that the last communication from IR 655 took place at 0654[1].

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[1] Although the Islamic Republic had filed some evidence concerning flight IR 655 with the ICAO Council on 12 July 1988 (see, para. 2.11, below, and Exhibit 36), it appears the United States had its own sources of information which independently confirmed the Islamic Republic's statements.

1.32 When Admiral Fogarty was called on to testify before the United States Senate about this report, he was specifically asked how the United States was aware of all this information. Admiral Fogarty responded:

> "Sir, I have to talk to that in closed session. I cannot discuss that at this level[1]."

1.33 What the Admiral meant by this cryptic remark was that the manner in which the United States had knowledge of the precise details of IR 655's radio transmissions was classified information. Because the hearing at which he was testifying was an open session, Admiral Fogarty could not discuss classified matters, which could only be done in closed session.

1.34 The Defense Department Report does not say whether any of the U.S. warships or the Middle East Task

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[1] See, the testimony of Rear Admiral William M. Fogarty (Director of Policy and Plans, U.S. Central Command of the U.S. Navy, and Head of the investigative team on the IR 655 incident) before the Committee on Armed Services of the United States Senate, 8 September 1988 (S. Hrg. 100-1035), p. 25. A copy of the record of this Hearing (herein referred to as the "Senate Hearings") is attached at Exhibit 7. See, also, the Defense Department Report, at p. E-10, where it is stated that "reliable intelligence information" was used to corroborate the fact that IR 655 was on a normal flight profile from Bandar Abbas to Dubai.

Force heard these messages. However, the capabilities of the United States to monitor radio transmissions and other communications, even when not sent over open VHF frequencies, are well known. The United States had access to facilities such as AWACS and other intelligence monitoring sources in the Persian Gulf region. For example, Caspar Weinberger, U.S. Secretary of Defense during this period, has confirmed that the United States was allowed to use Saudi Arabian AWACS facilities, giving immediate access to just this type of information in precisely the area where the incident took place:

> "Saudi-based aircraft would now help us ... and give us the most valuable thing we could have: additional time and knowledge of Iranian intentions and actions in the lower Gulf, particularly the Strait of Hormuz[1]."

The Defense Department Report acknowledges that U.S. warships had the capability to monitor such communications on board[2].

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[1] See, C. W. Weinberger, Fighting for Peace (Warner Books, 1990), pp. 407-408. A copy of extracts from this book is attached at Exhibit 8.

[2] Defense Department Report, p. E-53, para. 6. Extraordinarily, the ICAO Report states that the U.S. ships had no such capability. See, ICAO Report, para. 2.8.4.

1.35 Thus it must be assumed that the U.S. warships heard IR 655's communications, all of which were on open radio channels, including its communications when it was still on the ground at Bandar Abbas some thirty minutes before the incident. It also must be assumed that the U.S. Middle East Task Force Command, based in Bahrain, was monitoring flights in and out of Bandar Abbas during this period, given its alleged intelligence information about the possibility of an Iranian attack over the 4 July weekend and the presence of F-14s at Bandar Abbas[1]. Despite this knowledge and despite all of the other clear indications that IR 655 was a civilian aircraft which posed no threat to anyone, the _Vincennes_ requested and was given permission by the U.S. Middle East Task Force Command to shoot down the plane[2].

C. The Background Facts Relating to the United States Warships

1. The Show of Force of the U.S. Fleet in the Persian Gulf

1.36 Prior to 3 July 1988, the United States had amassed a large fleet of warships in the Persian Gulf and the northern Gulf of Oman. According to the United States, the purpose of this show of force was to protect neutral shipping in the Persian Gulf and to escort reflagged Kuwaiti tankers - an operation that commenced in 1987 and involved more than 40 warships in 500,000 tons and being able to double that figure at any time by bringing into the Persian Gulf the warships stationed in the Gulf of Oman . In reality, the aim of the United States was quite different, and the fleet was frequently used to provoke and intimidate the Islamic Republic and to aid Iraq and its supporters in the war that had been imposed upon the Islamic Republic by Iraq in 1980. It was this attitude which directly contributed to the downing of IR 655.

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[1] _Defense Department Report_, p. E-65.

[2] _Ibid._, p. E-9.

1.37 This policy was combined with the United States' embargo on all goods of Iranian origin and an almost total restriction on all trade relations with the Islamic Republic which was in operation from 1980 onwards. The United States had also put into effect "Operation Staunch" which was designed to prevent the Islamic Republic purchasing arms from anywhere in the world[1], and was accompanied by a near blockade of Iranian ports together with comprehensive monitoring and surveillance of vessels going to and from such ports. No such steps were taken against Iraq.

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[1] On "Operation Staunch", see, Weinberger, op. cit., pp. 421-424. See, Exhibit 8.

1.38 The partiality of the United States in respect to its operations in the Persian Gulf is clear from the Defense Department's own official investigation into the circumstances surrounding the downing of IR 655. The Defense Department Report contains a section entitled "Intelligence Background" in which certain background facts relating to events in the Persian Gulf are recounted. Although the Islamic Republic does not accept many of the Report's conclusions, it is significant that the Report states that it was Iraq which initiated attacks on shipping in the Persian Gulf in 1983 when it acquired French Exocet missiles. According to the Defense Department, these missiles provided Iraq with "a credible ship attack capability", and anti-shipping strikes by Iraq commenced in 1984. It was only afterwards that the Islamic Republic was forced to have recourse to the internationally recognized rights of visit and search of suspect vessels "to prevent war supplies from reaching Iraq[1]".

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[1] See, p. E-10 of the Defense Department Report. The United States has acknowledged that in visiting and searching vessels, the Islamic Republic had "exercised a 'traditional right'" of a belligerent "to prevent war supplies from being shipped to an enemy." See, with respect to the vessel President Taylor, New York Times, 13 January 1986 (copy attached at Exhibit 9). See, also, Department of State Bulletin No. 2108, March 1986, p. 41, also attached at Exhibit 9.

1.39 The Report then goes on to state that the Persian Gulf war intensified in 1987 -

> "... when Iraq used its Air Force to conduct an aggressive campaign against Iranian oil facilities and shipping. The campaign was centered in the central Persian Gulf (CPG) and intensified in May 1987. These expanded operations culminated in the 17 May 1987 erroneous attack on USS STARK[1]."

As the Court will recall, the USS Stark was hit by two French Exocet missiles fired from Iraqi air force planes on that day. Thirty-seven U.S. crewmen died in the incident and the vessel sustained substantial damage. It is significant that the United States held Iraq legally liable for its action but took no military response[2].

1.40 Despite these indications of Iraq's aggression and its responsibility for escalating the hostilities in the Persian Gulf, the United States has maintained that its warships were required thousands of miles from its shores just off (and often even within) the Islamic Republic's territorial sea, "to counter Iran's reckless behavior toward neutral ships engaged in lawful commerce[1]". From 1984 onwards the Reagan Adminsitration publicly anounced that the United States had informed various friendly nations in the Persian Gulf that the Islamic Republic's defeat of Iraq would be "contrary to U.S. interests" and that steps would be taken to prevent this result. In April 1984, it was revealed that President Reagan had signed two national security decision directives to set the stage for the U.S. Government to take a more confrontational stance against the Islamic Republic[2].

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[1] See, p. E-10 of the Defense Department Report.

[2] See, the statement of A. Sofaer, the Legal Adviser of the U.S. Department of State, before the Defense Policy Panel of the Committee on Armed Services of the U.S. House of Representatives, 4 August 1988, H.A.S.C. No. 100-119 (1989), p. 55 (herein referred to as the "House Hearings"). A copy of extracts from these Hearings is attached at Exhibit 10.

1.41 These are clear admissions of partiality. Moreover, while professing its neutrality, the United States continued to act to the contrary. As General Burpee acknowledged before the U.S. House of Representatives Hearings after the Stark incident:

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[1] The Persian Gulf Conflict and Iran Air 655, United States Dept. of State, Bureau of Public Affairs, Current Policy Publication No. 1093. This statement was taken from an address by then Vice-President Bush before the Security Council on 14 July 1988. A copy is attached at Exhibit 11.

[2] Middle East Policy Survey No. 102, 20 April 1984; see also, F.A. Boyle, "International Crisis and Neutrality: U.S. Foreign Policy Towards the Iran-Iraq War" in Neutrality: Changing Concepts and Practices (eds. A.J. Leonhard & N. Mercuro (1988)), pp. 72-73.

> "The Iraqis are our friends or at least friendly, and Iran is the one that is more hostile[1]."

This sometimes took the form of actually helping Iraqi forces. For example, the 14 May 1988 Iraqi attack on several Iranian oil tankers close to the Larak Island terminal took place with the complete cooperation of the U.S. forces in the area. During this episode, the U.S. Navy, by jamming the communication network of the Iranian warships and creating a safe flight corridor for Iraqi fighter aircraft, placed its facilities at the disposal of Iraq[2].

1.42 In reflagging Kuwaiti ships, the United States was openly helping a State which had consistently aided Iraq in its war effort. This abusive action of the United States was publicly protested by the Islamic Republic at the time[1]. As Secretary of Defense Weinberger admitted, "(o)ur official policy was to remain neutral", but, he went on, "we managed to have official United States statements and actions convey that we 'tilted' towards Iraq[2]". This is an understatement, but it reveals that the professed "neutrality" of the United States in the Iran-Iraq war was a hoax and that the United States' actions in the Persian Gulf were a breach of the laws of neutrality.

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[1] See, Hearings before the Committee on Foreign Affairs, House of Representatives, on 19 May, 1987 (75-507, 1987), at p. 41. A copy of an extract from these Hearings is attached at Exhibit 12.

[2] U.N. Doc. S/1988,5-16 May 1988.

1.43 In practical terms, the presence of such a large naval force within the confined area of the Persian Gulf heightened tensions and interfered with civil aviation despite U.S. assurances to the contrary. In this regard, it should be noted that paragraph 5 of Resolution 598, adopted by the Security Council at its 2750th meeting on 20 July 1987 and actively endorsed by the United States, called upon "all other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict, and thus to facilitate the implementation of the present resolution". The U.S. show of force in the Persian Gulf and its reflagging of Kuwaiti ships were a clear contravention of this Resolution. Moreover, under Article 42 of the United Nations Charter, it is for the Security Council, not the United States, to determine what action, if any, "may be necessary to maintain or restore international peace and security". In unilaterally assuming a role as policeman of the Persian Gulf, the United States ignored the authority of the Security Council and contributed to the escalation of the conflict.

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[1] See, 33 Keesing's Contemporary Archives 35598 (December 1987).

[2] Weinberger, op. cit., p. 358. See, Exhibit 8.

1.44 The United States' attitude was that it could station its ships wherever it pleased, and that neighbouring States would have to alter their civil aviation network and other activities in line with the dictates of the U.S. forces. As has since become clear, this form of "gunboat diplomacy" was part of a wider policy of the United States directed against the Islamic Republic which went far beyond the protection of neutral shipping. This involved trying to undermine the Islamic Republic's sovereignty in any way possible including trade embargoes and an arms blockade. The United States even went so far as to use the excuse of protection of neutral shipping to conduct major attacks against the Islamic Republic[1].

1.45 As discussed in detail in the next section, from the beginning of the United States' increased show of force in the Persian Gulf, the United States' aggressive attitude led to numerous incidents involving the harassment of commercial aircraft, for which the United States had come under harsh criticism even before the IR 655 tragedy.

2. U.S. Interference in Civil Aviation

1.46 The typical practice of the U.S. Navy in the Persian Gulf was to challenge virtually every aircraft that came even remotely close to its warships. The United States has sought to justify its actions by referring to the illegal NOTAMs (notice to airmen) that it promulgated: the first in January 1984 and the second in September 1987[1]. These NOTAMs warned aircraft that came within a certain distance of U.S. warships operating in the Persian Gulf that they would be at risk from "U.S. defensive measures" if they came too close.

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[1] For example, the United States alleged that it had succeeded in destroying half the Islamic Republic's naval forces in an attack on 18 April 1988, "Operating Praying Mantis". Weinberger, *op. cit.*, p. 425. *See*, *Exhibit 8*. As Weinberger notes, "(b)y an odd coincidence" this attack by the United States coincided with a major Iraqi offensive on the Al Faw peninsula. Weinberger continues:

> "The successful recapture of Al Faw ... set Iraq on a course of successful military campaigns that led to Iran's giving up and asking for a cease-fire."

See, also, *Defense Department Report*, pp. E-11 to E-12.

1.47 The 1984 NOTAM purported to warn any aircraft coming within 5 nautical miles of a U.S. vessel at an altitude of less than 2000 feet that they "may be held at risk by U.S. defensive measures". The 1987 NOTAM contained the same wording, but also called on aircraft, _inter alia_, to maintain a listening watch on 121.5 MHz VHF or 243.0 MHz UHF and to stay clear of U.S. vessels. It also indicated that aircraft would be called upon to identify themselves as soon as they were detected and that a failure to respond to U.S. requests for identification could place an aircraft at risk from U.S. defensive measures[2]. When faced with the

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[1] State Department White Paper, _Iran Air 655: Steps to Avert Future Tragedies_, R.S. Williamson; Current Policy No. 1092 issued by the Bureau of Public Affairs, p. 2. A copy of this statement is attached at _Exhibit 13_. The texts of the two NOTAMs are set out in _Exhibit 14_.

[2] _See_, _ICAO Report_, para. 2.2.

Islamic Republic's objections to the NOTAMs in ICAO meetings and meetings of the MID RAN States in 1984, U.S. representatives frequently assured the Islamic Republic and the aviation community that its NOTAMs in no way concerned commercial and passenger aircraft, which normally fly well above 2000 feet and consequently were at no risk.

1.48 These NOTAMs were subsequently recognized by ICAO to be illegal and impractical, and both were protested by the Islamic Republic at the time[1]. They directly contributed to endangering civil aviation over the Persian Gulf in general and to the destruction of IR 655.

1.49 As will be explained in more detail in Parts III and IV of this Memorial, the NOTAMs were illegal because the United States has no right to issue NOTAMs in the Persian Gulf area. They were impractical because their content was so vague and so wide-ranging that they would impede air traffic almost anywhere in the Persian Gulf[2]. Moreover, the United States failed to take any steps to coordinate with the relevant civil aviation and military authorities in the area. The ICAO Report found as follows:

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[1] See, para. 4.15, et seq., below.

[2] These aspects of the NOTAMs are discussed in detail at paras. 4.22, et seq., below.

> "There was no coordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the Gulf area[1]."

1.50 The result of these NOTAMs and the failure of coordination was that the United States caused confusion and danger to civil aviation in the Persian Gulf. Many of the resulting incidents have been well documented. For example, on 26 May 1987, 18 June 1987 and 13 July 1987 a number of Iran Air flights were challenged or forced to divert from their internationally designated routes by U.S. naval forces. At the time, the Islamic Republic protested these actions to the President of ICAO and called upon him to take appropriate measures to ensure safety for air traffic in the region[2].

1.51 After the 26 May 1987 incident, for instance, the Islamic Republic's Representative at ICAO wrote to Dr. Kotaite, the President of the ICAO Council, as follows:

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[1] ICAO Report, para. 3.1.20.

[2] Details of these incidents are set out in the Working Paper presented to ICAO by the Islamic Republic on 8 July 1988 (C-WP/8644). A copy of this Working Paper is attached at Exhibit 15.

> "I would like to emphasize that this is not the only event and U.S. naval forces in the Persian Gulf repeatedly violate the international law and common practices regarding the freedom of flying over the high seas.
>
> My delegation considers these unlawful acts as a direct interference against safety and regularity of international air transport operation.
>
> In the interest of safety of international air navigation and for the strict observance of the Chicago Convention and the standards and recommended practices of ICAO, your attention and appropriate action will be highly appreciated[1]."

Recognizing the significance of the danger, Dr. Kotaite on several occasions assured the Islamic Republic's delegation that the matter was receiving his personal attention.

1.52 Of course, the United States' actions did not solely affect Iran Air flights. On 8 June 1988, less than one month before the destruction of IR 655, a British Airways Boeing 747 on a scheduled flight from London to Dubai was challenged by a U.S. warship and told to change course just as it was about to land. At the time, the flight was under control of Dubai approach, and fortunately Dubai overruled the instruction, thus avoiding a very probable mid-air collision[1]. This led to a strong protest from Dubai air traffic controllers who requested "that U.S. warships desist from the practice of challenging every aircraft approaching the airport[2]". The American Embassy in Abu Dhabi was forced to apologize.

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[1] This letter is attachment 6 to the Islamic Republic's Working Paper attached at Exhibit 15.

1.53 Even after the 3 July 1988 incident, the United States continued to endanger commercial flights. On 3 August 1988, a Gulf Air flight climbing out of Sharjah heard a warning on 121.5 MHz apparently addressed to itself, yet the warning was in fact addressed to an Aerogulf helicopter operating from Dubai. This is a clear illustration of the danger and lack of clarity of these "challenges"[3]. On 30 January 1989, Iran Air 7812, en route from Dubai to Bandar Abbas, was told by the Bandar Abbas radar unit that it was being challenged by a U.S. naval warship. Although the pilot had been listening to the international distress frequency (121.5 MHz), he heard no challenges[1]. On 3 March 1989, an Iranian cargo flight en route from Bandar Abbas to Dubai received a warning over the UHF frequency (243 MHz) through the Bandar Abbas tower[2]. Another Iran Air flight (IR 301) en route from Tehran to Kish Island was challenged twice, on 5 May 1989[3] and again on 5 June 1989, on 243 MHz as it came in to land at Kish Island. Fortunately Kish Tower was monitoring 243 MHz (which civilian aircraft cannot hear) and relayed the challenge to IR 301, thus preventing another potential catastrophe[4].

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[1] See, Aviation Week & Space Technology, 11 July 1988, p. 22, a copy of which is attached at Exhibit 16. See, also, Appendix C to the ICAO Report which documents other similar incidents.

[2] See, Jane's Defence Weekly, 16 July 1988, p. 64, a copy of which is attached at Exhibit 17.

[3] ICAO Report, Appendix C, p. C-2. See, para. 1.75, et seq., below, for a discussion of the U.S. "challenges".

1.54 On dozens of occasions from 1984 onwards military aircraft of the Islamic Republic were also challenged by U.S. naval forces. Each time the Islamic Republic made a protest to the United States through its interests section at the Embassy of the Democratic and

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[1] See, the protest made by telex to the President of ICAO Council on 17 April 1989 by the Administrator of the Islamic Republic's Civil Aviation Organization. A copy of this telex is attached at Exhibit 18.

[2] A copy of the Islamic Republic's protest at this incident holding the U.S. Government "fully accountable for the consequences of such acts" is attached at Exhibit 19.

[3] Ibid.

[4] See, the protest made by telex on 31 July 1989, a copy of which is attached at Exhibit 20.

Popular Republic of Algeria[1]. It is important to note that on every occasion the Iranian aircraft took immediate steps to keep clear of the U.S. forces, that no hostile intent was ever shown by its aircraft, and that no attack was ever made on a U.S. warship[2]. As a matter of course, U.S. commercial vessels were never attacked.

1.55 To add to the confusion, U.S. warnings were often unintelligible: aircraft being challenged would simply not know whether they were the ones being contacted, as for example in the Gulf Air incident on 3 August 1988 noted above. The aviation journal Flight International made the following report:

> "British airline pilots have told Flight that radio interrogation in the Gulf by US warships is confusing. Typically, US warships will say 'Aircraft at 20,000 ft, range 15 n.m., bearing 310°; this is US warship - state your nationality and intentions'. This is ambiguous, as the aircraft being asked does not know where the ship is, and so may not realise the message is addressed to him[3]."

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[1] Copies of these protests are attached at Exhibit 21.

[2] See, paras. 1.106-1.109, below.

[3] Flight International, 16 July 1988, p. 8 (copy attached at Exhibit 22). Frequency 121.5 MHz, the international distress frequency, was also often used as a "chat" frequency in the Persian Gulf. Indeed, a British airline pilot familiar with the region observed that on the very day IR 655 was shot down, "an open microphone was placed in front of a commercial radio and was for some time broadcasting Wimbledon tennis match commentaries on 121.5"; ibid.

1.56 The conclusions of the ICAO Report bear this out. Not only did the Report conclude that "(t)he presence and activities of naval forces in the Persian Gulf area have caused numerous problems to international civil aviation[1]", it also stated:

> "Civil aviation requirements such as airways, standard approach and departure procedures, and the fixed tracks used by helicopters to oil rigs were not a consideration in warship positioning. This resulted in warships challenging civil aircraft often in critical phases of flight, i.e. during approach to land and during initial climb. In the absence of a clear method of addressing challenged civil aircraft, such challenges were, on occasion, mistaken by pilots to whom the challenge was not addressed, causing additional confusion and danger[2]."

1.57 It is highly relevant that the Defense Department itself has condemned its own warnings as unclear. As stated in the Department of Defense Report:

> "The current verbal warnings issued by CJTFME (Commander Joint Task Force Middle East) units (i.e., the Vincennes) do not clearly identify exactly which aircraft the ship is attempting to contact[3]."

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[1] ICAO Report, para. 2.3.1.

[2] Ibid., para. 2.3.2.

[3] Defense Department Report, p. E-18 (emphasis added).

The only thing that the ICAO Report and the Defense Department Report failed to mention was that U.S. warships had no right to issue such challenges in the first place[1].

3. The USS Vincennes

1.58 Against this backdrop of general interference in the Persian Gulf, the United States dispatched the Vincennes to join its Middle East Task Force in late May 1988.

1.59 The guided missile cruiser Vincennes is one of the most technologically advanced ships in the U.S. Navy. It is equipped with state-of-the-art detection devices and armaments. At its heart lies the highly-touted AEGIS combat system, which has been described as "the most advanced shipboard battle management system in the U.S. Navy[2]", but which was new and largely untested at the time.

1.60 The AEGIS system is supposed to be capable of detecting, tracking and targeting hundreds of targets simultaneously out to ranges in excess of 250 nautical miles[1]. This has been confirmed not only in the industry press, but also by Captain George Gee, the Director of the U.S. Navy's Surface Combat Systems Division. In testimony before the U.S. Senate, Captain Gee confirmed that the crew on board a ship like the *Vincennes* can sort out "50, 60, 70, 100 aircraft at a time when they are operating normally[2]". He went on to boast that as part of training the Navy routinely ran simulated raids against the *Vincennes* involving 30 or 40 aircraft in the most intense environments that it could replicate[3]. Given these capabilities, there would seem little doubt that the *Vincennes* could properly have dealt with one plane.

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[1] See, para. 1.75, below.

[2] Aviation Week & Space Technology, 11 July 1988, p. 19. See, Exhibit 16.

1.61 The information gathered by the AEGIS system is linked to numerous display consoles in the Combat Information Center (CIC) on the ship. These consoles not only display the identification code of any plane (in this case they correctly showed throughout the incident that the Airbus was squawking the Mode III identification signal 6760), they also show in simple figures that are updated every few seconds the altitude and the speed of an aircraft. These are the two elements which the *Vincennes* crew allegedly "misread" on their consoles[1]. Although the equipment itself is sophisticated, the information it produces is clear and simple. It does not need interpreting and it is inconceivable that it could be misread.

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[1] *Aviation Week & Space Technology*, 11 July 1988, p. 19. *See*, *Exhibit 16*. *See* also ICAO Report, para.1.16.1.3. for 457 km range.

[2] *Senate Hearings*, p. 28. *See*, *Exhibit 7*.

[3] *Ibid*. As shall be seen, at the time IR 655 was shot down, the *Vincennes* was only tracking *one* aircraft - IR 655. Prior to the incident, the AEGIS system had also tracked an Iranian P-3 which was 60 miles away and which identified itself to be a non-threat.

1.62 A telling description of the *Vincennes* and the attitude on board has been provided by Commander David Carlson, the Commander of the *USS Sides*, an American guided missile frigate which was operating in tandem with the *Vincennes* in the Persian Gulf on the day of the incident[2]. Writing in the September 1989 issue of *Proceedings* - a magazine published by the U.S. Naval Institute - Commander Carlson said:

> "Having watched the performance of the *Vincennes* for a month before the incident, my impression was clearly that an atmosphere of restraint was not her long suit. Her actions appeared to be

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[1] *See*, paras. 1.86-1.88, below.

[2] As will be discussed below, the *Sides* correctly evaluated IR 655 as a commercial flight.

> consistently aggressive, and had become a topic of wardroom conversation... 'Robo Cruiser' was the unamusing nickname that someone jokingly came up with for her, and it stuck. My guess was that the crew of the Vincennes felt a need to prove the viability of Aegis (the new highly advanced weapon system carried aboard the ship) in the Persian Gulf, and that they hankered for an opportunity to show their stuff[1]."

1.63 This description is not from a Hollywood film script: it is the straightforward opinion of the one man perhaps best placed to put the Vincennes' actions in their proper perspective. No doubt the U.S. Navy did "hanker" for a chance to experiment with its new weapons[2]. To do so against a civilian airliner thereby murdering 290 innocent people was not only irresponsible and illegal; it was unconscionable.

1.64 There is only one conclusion that can be drawn from these facts: even before the crew of the

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[1] Proceedings, September 1989, p. 88 (a copy is attached at Exhibit 23).

[2] The Soviet Union described the U.S. fleet as "trigger happy". Noting also that the U.S. claim that its officers had misread the radar were "strange", it confirmed its policy that a United Nations peacekeeping force should have been used in the region. International Herald Tribune, 5 July 1988, p. 5. A copy of this article is attached at Exhibit 24.

Vincennes allegedly "misread" the data recorded by its AEGIS system and fired the missiles which downed the plane, it is clear that the Vincennes was looking for an opportunity to use its force. It had been predisposed to treat the Islamic Republic as hostile and was ordered to station itself and hover in or just outside the Islamic Republic's territorial waters. Not only was this provocative, it was also in violation of the Islamic Republic's sovereignty since the U.S. warships did not obtain the prior authorization of the Islamic Republic required under the Executive Regulation to the 1934 Act concerning the passage of warships in Iranian waters[1]. Moreover, it transgressed the rules relating to innocent passage under international law, in particular Article 19, paragraphs 2(b) and (e) of the 1982 Convention on the Law of the Sea which provide that passage is not innocent if a vessel exercises or practices with weapons of any kind or if it engages in the launching, landing or taking on board of any aircraft. In so acting, the United States was clearly looking for a chance to use force against the Islamic Republic. It was this attitude which led to the southbound track out of Bandar Abbas on the morning of 3 July 1988 (IR 655) being labelled by the crew of the Vincennes from the moment of take-off as "Unknown-Assumed Enemy[1]".

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[1] See, para. 1.11, above, and Exhibit 5.

D. The Shooting Down of IR 655

1. Initial Stages of the Flight

1.65 This Memorial has already described the details of IR 655's flight on 3 July 1988, including its communications with air traffic control centres. Because, despite considerable efforts, IR 655's "black box" was never found, it is now appropriate to consider the same events from the point of view of the U.S. warships, particularly the Vincennes, during the same period.

1.66 On the morning of 3 July 1988, the United States had positioned three powerful warships inside the Islamic Republic's territorial waters in the vicinity of airway A59. These were the Vincennes, the Sides and the Elmer Montgomery, an anti-submarine frigate.

1.67 According to the United States, at approximately 0647 the Vincennes picked up IR 655 on its radar at a distance of some 47 nautical miles. This was just after take-off. One minute later, the Sides also picked up IR 655 on its radar[1].

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[1] Defense Department Report, p. E-31.

1.68 At the same time, the Vincennes was tracking one other aircraft. This was an Iranian P-3 which was detected some 62 nautical miles northwest of the Vincennes at 0647[2]. It is significant to note that when the Vincennes first challenged the P-3, it specifically identified it as a P-3 even though the plane was not squawking any identification signal[3]. This shows that the Vincennes was capable of differentiating between different types of aircraft without the need for an identification signal and, given the fact that the AEGIS system had a range of 250 nautical miles, that such identification could be made over the Iranian mainland, including over the route IR 655 was flying when it made the first leg of its trip, from Tehran to Bandar Abbas[4].

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[1] Defense Department Report, p. E-8.

[2] ICAO Report, Appendix A, p. A-3.

[3] See, ICAO Report, Appendix B, p. B-17. At page E-33 of the Defense Department Report the United States admits that the P-3 was "non-squawking".

[4] See, para. 1.60, above, and para. 4.24, below.

1.69 In any event, the Vincennes quickly determined that the P-3 was not a threat since, in the words of the Defense Department Report, it was on a "routine maritime patrol[1]". As a result, the enormous capacity of the ship's AEGIS system and its entire crew had only one aircraft to deal with - IR 655. As already noted, the information from the radar consoles was simple to read - it showed the speed, the altitude and the commercial code of IR 655.

1.70 As soon as IR 655 was detected, the AEGIS system determined that it was transmitting a normal civilian transponder code - Mode III 6760[2]. At no time did the system ever detect any other emission coming from IR 655. Some crew members claimed to have seen a Mode II - 1100 response at 0650[3]. The Defense Department Report, however, admitted that this Mode II response never reappeared, and in fact it was not recorded anywhere in the ship's data system. In short, the AEGIS system never picked up a Mode II response which might have been associated with a military aircraft. As confirmed by the Defense Department Report, based on the data tapes of the information stored in the AEGIS system: "Iran Air Flight 655 was not squawking Mode II - 1100, but squawked Mode III -6760 during the entire flight[1]."

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[1] Defense Department Report, p. E-7.

[2] Ibid., pp. E-30 to E-31.

[3] Ibid., p. E-35. Allegedly this Mode was associated with Iranian military aircraft.

1.71 Despite this clear evidence of the commercial nature of the aircraft, two of the *Vincennes*' senior officers in the Combat Information Centre - the Tactical Information Coordinator and the "Golf Whisky" (the officer who was responsible for managing the air picture) - allegedly heard the plane identified as an F-14[2]. The Defense Department Report then says the following about what developed:

> "From that moment on, the Anti-Air Warfare Coordinator's (AAWC) organization, most especially the Tactical Information Coordinator (TIC), ... and the Golf Whisky (Force Anti-Air Warfare Coordinator) ... were convinced the incoming aircraft was an F-14, despite the fact that the Mode II IFF signal did not reappear and the ship's SPY-1 Radar System only held Mode III 6760[3]."

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[1] *Defense Department Report*, p. E-51 (emphasis added).

[2] *Ibid.*, p. E-33.

[3] *Ibid.*, p. E-59.

There was absolutely no basis for such a "conviction". To the contrary, information derived from all the ship's computers as well as the commercial airline schedule showed the plane as a commercial flight. IR 655's communications on open radio channels would also have shown this to be the case.

1.72 The Department of Defense Report asserts that at 0648 - one minute after IR 655's detection - the Identification Supervisor of the Vincennes consulted the commercial air schedule that was available in the Combat Information Centre. The Report states that this schedule was reviewed by the Vincennes' decision-making personnel "on a regular basis prior to the engagement[1]". If such personnel did consult the schedule, they did so at a time when IR 655 was squawking a Mode III code, was on schedule, and was climbing within the ordinary air corridor, on a morning when there was only one commercial flight due to depart from Bandar Abbas - IR 655.

1.73 The scheduled time of departure from the terminal was 0620, with actual take-off expected some 10-15 minutes later. Due to a slight delay, the plane actually took off at 0647. Nonetheless, this was very close to schedule as was confirmed by the pilot's communication shortly afterwards to Tehran ACC that he was estimating arriving at Dubai at 0715. In any event, on the day of the incident, three U.S. warships had been in the area all morning tracking all aircraft within several hundred miles. Their familiarity with the commercial airline schedule would have made them well aware that IR 655 had not yet flown over. Thus, any attempt to suggest that the precise overflight time of IR 655 could not be identified from the schedule is wrong and irrelevant. Identifying the plane as IR 655 should have been simple given that, in the words of the ICAO Report, "the Aegis system recorded a flight profile consistent with a normal climb profile of an Airbus A300[1]".

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[1] Defense Department Report, p. E-33.

1.74 It was also at 0648 that the USS Sides trained her weapons fire control radar on the flight as a precautionary measure[2]. This step is known as "illuminating" a target, which means that the target has been locked in by radar that then acts as the guidance system for any missile subsequently launched. Despite being illuminated, IR 655 showed no reaction. It neither changed course nor altered its normal climb pattern. According to the Commanding Officer of the Sides, "this was most unusual" because obviously an attacking aircraft would have been expected to start evasive manoeuvres[1]. This fact provided still further evidence that the plane was not a military aircraft and that it had no hostile intent.

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[1] ICAO Report, para. 3.1.26.

[2] Ibid., Appendix A, p. A-4.

2. Alleged "Challenges" by the Vincennes and the Sides

1.75 At 0649:39, the Vincennes allegedly issued its first challenge to IR 655 asking it to identify itself[2]. This challenge was sent over the military frequency 243 MHz which commercial aircraft such as IR 655 are not equipped to hear and to which they therefore obviously cannot respond. The ICAO Report and the Defense Department Report variously refer to these communications as "challenges" or "warnings" to IR 655. What is not stated in these Reports is that there is no basis in either aviation law or practice allowing "challenges" to be made to civil aircraft. The whole idea of "challenges" is so obviously outside the bounds of legality that it is not a concept recognized in the vocabulary of international air law. There are rules of interception for intruding aircraft and warnings that can be promulgated only by ATC authorities in the event of serious meteorological hazards; these are not "challenges" and they are obviously not relevant here[1].

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[1] Carlson, op. cit., p. 89. See, Exhibit 23.

[2] ICAO Report, Appendix A, p. A-5.

1.76 Despite the totally illegal and unprecedented nature of these "challenges", the United States seeks to justify its shooting down of IR 655 by maintaining that the Vincennes and the Sides sent, in the few minutes before the firing, a total of eleven challenges to IR 655 which went unanswered. Of these, seven were said to have been addressed over the 243 MHz frequency, which civilian aircraft could not monitor. The other four were supposedly sent over the international distress frequency, 121.5 MHz, which IR 655 could theoretically have been monitoring. Even as to these, however, the United States has admitted that the warnings were not clear and that IR 655 had good reason not to listen to them in any event.

1.77 It has to be pointed out that in nearly every case where military forces have destroyed a civilian aircraft, the responsible party has tried to justify its action on the ground that the aircraft failed to heed warnings. The Soviet Union advanced the failure of intruding aircraft to follow instructions as justification for firing in the several incidents in which it was involved between 1952 and 1978, and did the same in the shooting down of KAL 007 in 1983. The Bulgarian Government also claimed that the El Al aircraft involved in the 1955 incident refused to comply with instructions to land. Similarly, Israel maintained that the Libyan aircraft involved in the 21 February 1973 incident in the Sinai desert refused to heed repeated warnings[1]. These justifications by the countries involved were not on the whole recognized by the world community, especially the United States, as excusing responsibility for the incident.

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[1] See, paras. 3.37-3.39, below.

1.78 The Islamic Republic categorically denies that any of the 121.5 MHz messages were actually sent to IR 655 or, if they were, that they were capable of being heard or understood. The only source of evidence of the alleged challenges comes from the Defense Department's own report and, as the following picture that emerges from the records shows, must be viewed with great caution.

1.79 After the incident, the Commander of the U.S. Middle East Task Force reportedly requested the allied

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[1] See, W. T. Hughes, "Aerial Intrusions by Civil Airliners and the Use of Force", 45 Journal of Air Law and Commerce (1980), pp. 600, et seq.

(NATO) ships in the region at the time to indicate whether they had heard the warnings to IR 655 over the international distress frequency (121.5 MHz). The British warship, HMS Manchester, responded that it had not heard any warnings. Similarly, Italian Naval Headquarters indicated that its warship, the Espero, also had not heard any warnings on that frequency although it apparently knew the Vincennes was tracking IR 655 and was data-linked to the U.S. warships[1]. Only the HMS Beaver apparently claimed to the United States to have heard the warnings[2].

1.80 The ICAO investigation team asked everyone in the area for confirmation of these messages, including private shipowners and other airliners. No further confirmations were forthcoming. As for air traffic centres on the ground, Bandar Abbas air traffic control recorded no such warnings over the international distress frequency. Emirates ACC recorded no messages at all over 121.5 MHz, although it did hear some messages broadcast over the military frequency, 243 MHz[3]. Personnel at Dubai approach control were listening to 121.5 MHz throughout the relevant period, but they too reported that no messages were recorded[1]. Neither Abu Dhabi nor Oman ACCs reported hearing any such messages. Given that two of the three neighbouring warships and all of the ground stations heard no challenges to IR 655 over 121.5 MHz, there is a serious question whether they were actually sent or, if sent, whether they were communicated in a way that could be heard by IR 655. Only one allied naval vessel, the HMS Beaver, reported hearing them.

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[1] ICAO Report, Appendix A, p. A-8.

[2] See, Defense Department Report, p. E-25; ICAO Report, para. 2.10.5.

[3] ICAO Report, Appendix B, pp. B-13 and B-17 to B-21.

1.81 Even if the challenges had been audible, the United States concedes that they were so obscure as to be practically unintelligible to an approaching aircraft. To cite again from the conclusions of the Defense Department's investigation:

> "Current verbal warnings and challenges used by JTFME units are ambiguous because they do not clearly identify to pilots exactly which aircraft the ship is attempting to contact[2]."

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[1] ICAO Report, para. 2.10.6.

[2] Defense Department Report, p. E-53; see, also, p. E-18.

1.82 Moreover, it is well known that during the first few minutes of a flight the pilot and co-pilot must devote complete attention to handling the aircraft. Along with landing, this is the most difficult and dangerous phase of the flight. As the Defense Department Report observes:

> "Due to heavy pilot workload during take-off and climb-out, and the requirement to communicate with both Approach Control and Tehran Center, the pilot of Iran Air Flight 655 probably was not monitoring IAD (the international air distress frequency of 121.5 MHz)[1]."

1.83 The finding that, even if sent, these "challenges" either would have coincided with radio communications being transmitted by IR 655 to ground control units or, if not, were so imprecise that IR 655 could not have identified itself as the object of the challenges is endorsed by the ICAO Report. The Report found that the contents of the challenges varied from one transmission to the next and allegedly included information such as bearing, range and speed. While course information might have been recognizable to the crew, speed information based on ground speed might well not have been recognizable, since air speed and ground speed are not necessarily the same and geographical coordinates would have been almost impossible to decipher at short notice. Moreover, bearing and range information was of little or no assistance to the pilot because the aircraft could not see the ship issuing the challenge and thus would not know where and at what distance that ship was. In particular, range expressed in yards would be confusing[1]. In short-

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[1] Defense Department Report, p. E-53. It is known, for example, that at least the second challenge supposedly sent (0651:09 to 0651:45) was coincidental with a communication from IR 655 to Tehran ACC.

> "It is uncertain whether the flight crew would have been able to rapidly and reliably identify their flight as the subject of these challenges and warnings[2]."

1.84 The ICAO Report notes at paragraph 2.10.18 that only the last of the four challenges made on the international distress frequency identified IR 655 with sufficient detail to permit the pilot, if he had heard the challenge, to realize that his plane was being addressed. However, the Report fails to mention that this warning was made only thirty-nine seconds prior to the destruction of the plane, and that during eleven of those thirty-nine seconds, IR 655 was in communication with Bandar Abbas.

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[1] ICAO Report, paras. 2.10.10 to 2.10.17 and 3.1.22.

[2] Ibid., para. 3.1.22.

Based on the foregoing, it can be concluded that none of the alleged challenges to IR 655 from the Vincennes and Sides were either received or understood in time by the flight crew.

3. IR 655 Was Not Misidentified by the U.S. Warships

1.85 According to the Defense Department Report, at 0651 the Vincennes' Combat Information Officer jumped up and said, "possible COMAIR" (commercial airliner) to the Commanding Officer[1]. This assessment was apparently based on the fact that IR 655 was seen to be slowly ascending from 8,000 to 9,000 feet and was squawking Mode III just as would have been expected of a commercial aircraft[2]. The Commanding Officer acknowledged this report by raising his hand but did nothing about it and subsequently proceeded to fire on the aircraft[3].

1.86 The Defense Department Report contains large deletions in its discussion of this time period, which gives the appearance that the full story has not been made public. General Crist and others have tried to portray a state of confusion in the command centre of the Vincennes at this time, with contradictory and incorrect information being passed from crew members to the Commanding Officer[1]. In particular, it is alleged that certain reports were made by crew members that IR 655 was speeding up, descending and veering towards the Vincennes. The United States is forced to admit however that none of the ship's technical equipment revealed any such movements by the approaching aircraft. IR 655 was clearly ascending, and was in no way veering towards the Vincennes. Realizing that allegations about IR 655 showing hostile intent are thus totally implausible, the United States was forced to come up with a psychological theory to explain the total lack of correlation between what the crew members of the Vincennes allegedly thought they saw and the information actually portrayed on the consoles in front of them, which was recorded and stored in the AEGIS system data tapes. This theory, given the colourful name "scenario fulfilment", is simply not credible, and even if it were, it would not excuse the United States' actions.

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[1] Defense Department Report, p. E-37; ICAO Report, Appendix A, p. A-8.

[2] Ibid. See, ICAO Report, Appendix A, pp. A-8 and A-10. See, also, House Hearings, p. 183 (Exhibit 10).

[3] Ibid.

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[1] See, for example, pp. E-59, et seq., of the Defense Department Report.

1.87 First, it is not possible to misread the information on the radar consoles. They show information about an approaching plane in the simplest form. In this case, they unmistakably showed the plane as ascending at a steady speed. Moreover, it is apparent from the diagram on page E-32 of the Defense Department Report that there were at least a dozen crew members in the Combat Information Centre with consoles in front of each of them,apart from the large screen displays.[1] The U.S. position assumes that all of these crew members simultaneously misread the information displayed in front of them. Second, there appears to be no evidence, apart from crew members' recollections of reports of IR 655 descending, that the consoles were in fact misread. Third, the Vincennes' own transcripts of the alleged "challenges" made to IR 655 reveal that it was fully aware throughout the flight, right up until the moment the missiles were fired, that the altitude of the plane was increasing and that its speed was approximately 350 knots[2]. This information was correct and was consistent with the flight profile of an Airbus, but totally inconsistent with the U.S. allegation that crew on the Vincennes thought the plane was diving and increasing speed in an attack profile.

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[1] On the day of the incident the Vincennes had 358 crew members, including 24 officers. ICAO Report, para.1.16.1.3.

[2] The transcripts of the challenges are reproduced in Appendix B of the ICAO Report.

1.88 The "scenario fulfilment" theory is flawed in other respects. For example, it fails to explain why the crew on the Sides and the Montgomery did not treat IR 655 as a threat. Moreover, it relies on the alleged state of exhaustion of the crew members; yet they in fact had freshly arrived in the Persian Gulf and, at the time, had only one plane to deal with when they had supposedly been trained to handle hundreds. According to the Commander of the Sides, they hankered for action, which hardly suggests battle-weariness and stress.

1.89 At the same time as the Combat Information Officer on the Vincennes was suggesting that the plane was a "possible COMAIR" (0651), several operators on the Sides also evaluated the flight as a commercial "Haj" flight on its way to Saudi Arabia to pick up pilgrims. Two operators reported this to the Tactical Action Officer[1]. Two minutes later, the Sides' Commanding Officer decided finally that IR 655 was not a threat to his ship and turned his attention elsewhere[2]. Even the Defense Department Report records the fact that IR 655 was identified as commercial. Despite this admission, it is interesting to note that five paragraphs of the Defense Department Report have been deleted at this point[1].

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[1] ICAO Report, Appendix A, p. A-7.

[2] Ibid., p. A-9. The last challenge by the Sides correctly identified IR 655's commercial identification number.

1.90 On the Montgomery there was also no detection of any electronic emission that would have correlated IR 655 with an F-14[2], and the Montgomery did not treat IR 655 as hostile. Standard procedure must have dictated that this information, available both to the Montgomery and the Sides, be communicated immediately to the Vincennes, which was in tactical control of the other ships and with whom these ships were data-linked and in constant radio contact[3].

1.91 Such information was also available to the U.S. Middle East Task Force through its own intelligence sources. At 0650, the Vincennes had contacted the Task Force informing them that it intended to engage an F-14. "Golf Bravo" (the call sign of the Task Force) told the Vincennes to warn the aircraft first before firing. The

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[1] Defense Department Report, pp. E-36 to E-37.

[2] ICAO Report, Appendix A, p. A-9.

[3] The Italian warship Espero was apparently also data-linked to the U.S. warships. ICAO Report, Appendix A, p. A-8.

Defense Department Report alleges that, despite all the sophisticated intelligence information it had available, "(i)n the limited time available, CJTFME (i.e., the Task Force) could not verify the information passed by USS Vincennes[1]". Again, this is not plausible. The United States acknowledges monitoring movements at Bandar Abbas and was clearly able to hear open radio communications from planes on the runway. IR 655 had been in open radio communication for over twenty minutes by this time. Such information could have been checked and passed to the Vincennes in seconds. Thus, the Task Force Command must have been aware of the target by the time the Vincennes fired, yet it failed to retract its authorization to fire.

4. The Firing on the Plane

1.92 At 0654:22, a full three minutes after the Vincennes and the Sides had identified the plane as a possible commercial flight, the Vincennes fired its first missile followed immediately afterwards by a second. At 0654:43, IR 655 was hit. On impact, it was flying at an altitude of 13,500 feet, maintaining a speed of 383 knots, cruising well within the A59 corridor at a range of approximately 10 nautical miles from the Vincennes and still squawking Mode III 6760. It was not veering in any way towards the Vincennes in an attack profile.

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[1] Defense Department Report, p. E-36.

1.93 Thus IR 655 was well outside the stated limits of 5 nautical miles and 2000 feet within which, according to the illegal U.S. NOTAM, a plane would have to come before it would be at risk from U.S. "defensive" measures[1]. Moreover, the Captain of the Vincennes made no attempt to call for interception of IR 655 by U.S. military aircraft operating in the Persian Gulf region, which would have taken a matter of minutes, nor did he attempt to fire a warning flare. In another reported incident, a U.S. officer waited until a real F-14 was at a range of 7 nautical miles before firing a warning flare[2]. No such steps were taken by the Vincennes. Thus, even by the United States' own standards, the action of the Vincennes was totally unjustified.

1.94 Twenty-five minutes after it had destroyed IR 655, and although the Montgomery was apparently able to see and give the position of the splashdown of the plane (and thus presumably could see that it was not an F-14), the Vincennes reported the destruction of an F-14[1]. While the Defense Department Report gives a second-by-second analysis of the events up to the destruction of the plane, no information is given on what happened in these subsequent twenty-five minutes. The shooting down of an Iranian plane, whether civilian or military, was surely not such an insignificant event. It is also noted that neither the Vincennes nor its other sister vessels assisted in any way in rescue and salvage operations after the crash, although they were bound to do so for the most elementary humanitarian reasons.

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[1] See, para. 1.46, et seq., above.

[2] International Herald Tribune, 9-10 July 1988. A copy of this article is attached at Exhibit 25.

1.95 IR 655 was hit at the approximate position 26°38'22" N; 56°01'24" E, and the wreckage splashed down at 26°37'45" N; 56°01' E, some 1.5 miles from Qeshm Island and 6.5 miles from Hangham Island[2] - in other words in an area which was well within the Islamic Republic's internal waters. The position of IR 655 at the time of firing of the missile is shown on Figure 4, together with the positions of the three U.S. warships all well within the Islamic Republic's territorial waters. Search and rescue operations were commenced but no survivors were found. Despite considerable efforts, the "black box" was not recovered most probably because of the strong currents in the area.

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[1] ICAO Report, Appendix A, pp. A-12 to A-13.

[2] Ibid., Appendix A, p. A-12; Defense Department Report, p. E-42.

E. U.S. Attempts to Deny Responsibility

1.96 Immediately after the incident, the United States embarked on a concerted effort to misinform the public and deny responsibility. In the first official statement about the incident, President Reagan noted that the airliner was heading directly towards the Vincennes which fired "to protect itself against possible attack". Admiral William J. Crowe, Jr., Chairman of the U.S. Joint Chiefs of Staff, also stated that the Vincennes "fired in self-defense", alleging that the plane was "closing at high speed" on the Vincennes[1]. In the following days, various false scenarios were conjured up to buttress the United States' plea that its warships had acted in self-defence.

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[1] The texts of the Reagan and Crowe statements are set out in the International Herald Tribune, 4 July 1988. A copy of this article is attached at Exhibit 26.

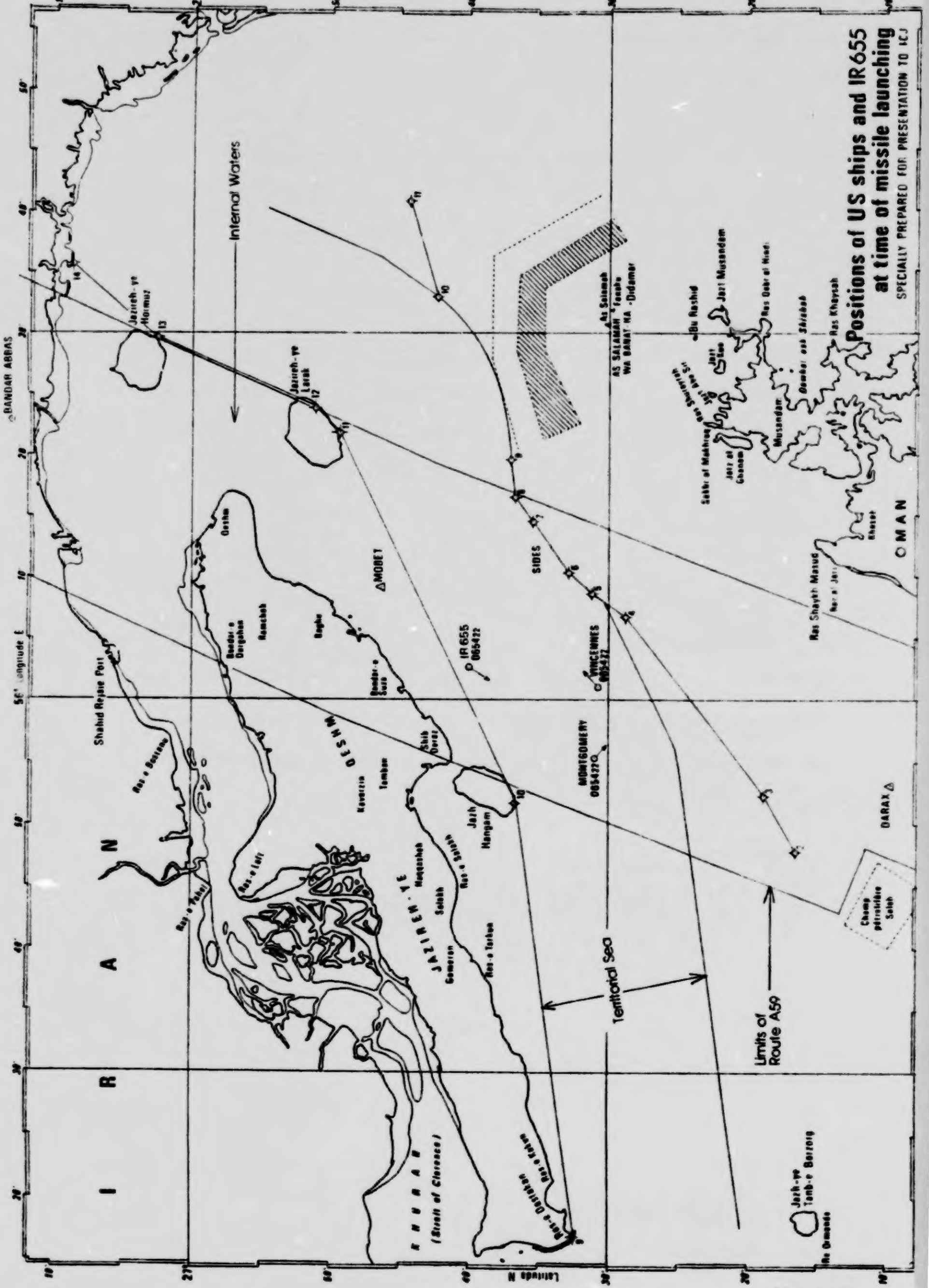
Positions of US ships and IR655 at time of missile launching
SPECIALLY PREPARED FOR PRESENTATION TO ICJ
I R A N
O M A N
BANDAR ABBAS
Internal Waters
Territorial Sea
Limits of Route A59
Jazireh-ye Hormuz
Jazireh-ye Larak
Shahid Rejaie Port
Q E S H M
JAZIREH-YE
(Strait of Clarence)
Qeshm
Ramchah
Dargahan
Jazh Hangam
VINCENNES 065422
MONTGOMERY 065422
IR655 065422
SIDES
MOBET
DARAX
Jazh-ye Tanb-e Bozorg
Ras Shaykh Masud
Ras Khaysah
Musandam
Jazt Musandam
Latitude N
56° Longitude E

Figure 4

These included stories that an F-14 was "hiding" behind IR 655; that the plane was on a suicide mission or part of a coordinated surface attack involving Iranian small boats; that it was diving towards the Vincennes; that it was squawking a Mode II code; that it was flying outside the recognized air corridor; and that it was part of a series of attacks that were planned against the United States over the 4th of July period. None of these accounts were in the least bit accurate, as the United States subsequently conceded[1].

1. The "F-14 Theory" and the Alleged Mode II Response

1.97 The initial reports from the Vincennes claimed that an Iranian F-14 had been shot down. This version of events quickly began to be circulated by the United States.

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[1] It is of interest to note that the Committee on Public Doublespeak of the National Council of Teachers of English gave the U.S. Defense Department first prize for 1988 for its report on the IR 655 incident. According to a United Press International report, the Committee Chairman, William D. Lutz of Rutgers University, noted that "(t)he language used in the official report and the language used during the press conference was filled with the doublespeak of omission, distortion, contradiction and misdirection". He went on to note that the Report itself censored "essential information" and lacked "any original source information". See, Kayhan International, 21 November 1988. A copy is attached at Exhibit 27.

1.98 Much attention in the foreign press was devoted to the rumour that IR 655 was transmitting a Mode II code and thus had to be a military plane. This theory even found its way into Flight International. The headline appearing in Flight International on 16 July 1988 was indicative of the kind of information being disseminated. It read:

> "US insists Iran Airbus had military squawk".

The article went on to report that:

> "The Pentagon, after examining taped records of the USS Vincennes Aegis weapon system, insists that the Iran Air Airbus A300 shot down on July 3 was squawking a military transponder code, known as Mode 2. It was this that convinced the Vincennes' captain, Capt. Will Rogers, that the track was hostile[1]."

1.99 A Pentagon spokesman, Dan Howard, tried to reinforce this theory. When asked whether a Mode II response could have come from another plane hiding behind the Airbus or from a military plane still on the ground at Bandar Abbas, Howard stated:

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[1] Flight International, 16 July 1988, p. 8. See, Exhibit 22.

> "The signal (Mode II) could not have come from Bandar Abbas; it had to come from that box (the small area in the sky the Vincennes' radar was watching), and there was only one thing in that box - a single aircraft[1]."

He continued:

> "If you're getting a Mode 2 response from an aircraft then you are talking about a military aircraft. It doesn't matter what the numbers are, it's an Iranian military aircraft ...[2]".

1.100 Admiral Crowe lent his weight to the "hostile aircraft" story. On 11 July 1988, Aviation Week & Space Technology reported him as maintaining that when the aircraft was hit it was bearing directly at the Vincennes at a high speed of 450 knots and some 4-5 miles outside the normal commercial air corridor. He termed IR 655's route a "threatening flight profile" which, when coupled with the plane's alleged Mode II transmission, led it to be classified as "hostile"[1].

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[1] See, Exhibit 22 at p. 8.

[2] Ibid.

1.101 All of this was manifestly false. As is clear even from the transcripts of the challenges allegedly made to IR 655 by the Vincennes, the Vincennes itself was fully aware at the time that the plane was ascending, was flying at a speed of approximately 350 knots, and was within the air corridor. The only reason why the plane was perceived to have been heading directly at the Vincennes was because the Vincennes had placed itself directly underneath the A59 airway in the Islamic Republic's territorial sea. Moreover, based on Figure 2 on page 22 of the ICAO Report and Figure 4 herein, it can be seen that if anything IR 655 was heading towards the Montgomery not the Vincennes, yet the Montgomery treated it as a commercial aircraft.

1.102 The Pentagon also attributed importance to the fact that the Vincennes had reported that the aircraft had dived steeply from 9,000 to 7,000 feet just before it was fired upon. When conflicting reports began to emerge that the Sides had placed the aircraft at 12,000 feet and ascending, Defense Department officials tried to cover up their embarrassment by stressing that the Sides' radar was less accurate than that of the Vincennes[1]. This was simply more disinformation. As already noted, even the transcripts of the Vincennes' challenges show that it knew that the plane had ascended from 7,000 feet to 10,000 feet[2].

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[1] Aviation Week & Space Technology, 11 July 1988, pp. 17-18. See, Exhibit 16.

1.103 Even if the plane had actually been an F-14, it still would not have posed any genuine threat to the Vincennes. This was acknowledged in Aviation Week & Space Technology, which wrote that:

> "A number of U.S. military and industry officials ... questioned whether an F-14 posed a serious threat to the Vincennes. F-14A fighters sold to Iran by the U.S. were equipped to carry air-to-air missiles and have limited surface attack capabilities[3]."

1.104 Confronted with the suggestion that an F-14 attack against a surface ship was highly implausible, the Pentagon was forced to seek even more far-fetched explanations. Dr. Norman Friedman, a U.S. naval analyst, came out with one such story which was seized upon by Washington "hawks" as justification for the Vincennes' decision to shoot. Friedman argued that the plane - even if it had been positively identified as an Airbus - still "would have made an effective Kamikaze[1]". While recognizing that the Islamic Republic had almost no anti-surface missile capacity he also contended that an F-14 could have been equipped with unguided iron bombs that would have posed a threat[2].

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[1] See, Exhibit 16 at p. 18; see, also, Flight International, 16 July 1988, p. 8 (Exhibit 22).

[2] ICAO Report, Appendix B, p. B-16.

[3] Aviation Week & Space Technology, 11 July 1988, p. 16 (Exhibit 16).

1.105 These arguments cannot be taken seriously. According to Flight International:

> "A US Navy Tomcat pilot has derided the anti-ship suggestion, saying that hanging anti-ship missiles on an F-14 would be an extremely complex job, and that an anti-ship attack profile would not be at medium level[3]."

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[1] Norman Friedman, "The Vincennes Incident", in Proceedings/Naval Review, 1989, p. 76 (a copy of this article is attached at Exhibit 28).

[2] Ibid., p. 73. Even the Defense Department Report acknowledges that iron bombs would only have been a threat at a range of 2 nautical miles. IR 655 was shot down at a range of 10 nautical miles. Defense Department Report, p. E-12.

[3] Flight International, 16 July 1988, p. 8 (Exhibit 22).

"No pilot in his right mind would attack a ship that way" was the view of the Tomcat pilot.

1.106 The Commanding Officer of the Sides, Commander Carlson, went on record in September 1989 to rebut the various "self defence" theories being advanced by the United States. First, he exploded the myth that Iran might have been attempting a secret attack on the Vincennes using a military plane disguised as a civilian aircraft flying in the commercial air corridor. Commander Carlson wrote:

> "My experience was that the conduct of Iranian military forces in the month preceding the incident was pointedly non-threatening. They were direct and professional in their communications, and in each instance left no doubt concerning their intentions[1]."

1.107 Next, he took on the "hostile F-14" scenario. Pleading to "spare us more fog", Commander Carlson asked why an F-14 would bother to energize its IFF system to squawk Mode II (a military signal) if it was trying to disguise its presence for a sneak attack. He also pointed out that one of the reasons why the Sides had classified IR 655 as a non-threat was because of the "lack of any significant known F-14 antisurface warfare (ASUW) capability[1]".

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[1] Carlson, op. cit., p. 87 (Exhibit 23).

1.108 Finally, he discredited the idea that IR 655 might have been part of a wider attack involving surface units. This theory will be taken up in the next section.

1.109 The U.S. Defense Department itself has confirmed Commander Carlson's assessment. In particular, it has shown that the United States was well aware that there was absolutely no precedent for an air attack on a U.S. warship by the Islamic Republic, and that on every other occasion when U.S. forces had challenged the Islamic Republic's aircraft, for safety reasons the aircraft had taken steps to avoid the U.S. ships[2]. The U.S. Assistant Secretary of Defense stated on 19 May 1987 that "Iran has been careful to avoid confrontations with U.S. flag vessels when U.S. Navy vessels have been in the vicinity[1]". He went on to express the Department of Defense's view on the Islamic Republic's capacity to launch such an attack:

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[1] Carlson, op. cit., p. 89 (Exhibit 23).

[2] See, para. 1.54, above. After each incident the Islamic Republic protested to the United States about the challenge and a notice of the protest was given to the Security Council.

> "Iran lacks the sophisticated aircraft and weaponry used by Iraq in the mistaken attack on the USS Stark[2]."

2. The "Coordinated Attack" Theory

1.110 The United States has claimed that on the morning of 3 July 1988, just as IR 655 took off, a number of Iranian small boats of the Boston Whaler or Boghammer type attacked its warships. According to this version of events, having misidentified IR 655 as an F-14 immediately after take-off, the Vincennes then became convinced that the plane was joining in the attack by the small boats[1].

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[1] Department of State Bulletin, July 1987, p. 60. A copy of this document is attached at Exhibit 29. Weinberger also notes in his book Fighting for Peace, op. cit., p. 401, that the Islamic Republic had clearly demonstrated in the past "a decided intent to avoid American warships" and that as a result the Department of Defense was "confident that we were not subjecting our forces to imminent hostilities". See, Exhibit 8.

[2] Department of State Bulletin, July 1987, p. 60 (Exhibit 29).

1.111 Such a hypothesis has no basis in fact and is absurd on its face. The thought that a type of Boston Whaler, which is ordinarily used for recreational sports, or a Boghammer, would attack three of the United States' most powerful warships, including a guided missile cruiser and a guided missile frigate, is nonsensical. As the Commanding Officer of the Sides remarked, the idea of such an attack-

> "... just does not add up. The harder you look at it, the more absurd the concept seems that a few speedboats would be taking on the Vincennes

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[1] Defense Department Report, pp. E-47 to E-49. According to the ICAO Report, there were five factors which initially led the Vincennes to classify the IR 655 as a hostile F-14: (i) the fact that it had taken off from a joint civilian/military airfield; (ii) the existence of intelligence information that Bandar Abbas was used to deploy F-14s and the thought that there might be hostile activities over the 4th of July; (iii) the alleged Mode II response from the flight; (iv) the fact that IR 655's flight time could not be correlated to the civilian schedule; and (v) the possibility that it might be used to assist surface engagements. (ICAO Report, para. 3.1.23.) None of these reasons have any validity. The first and second reasons, even if true, provide no excuse for downing a commercial aircraft. The third and fourth reasons have already been completely disproved. The fifth is taken up in this section.

and the *Elmer Montgomery* with any notion of success[1]."

1.112 What actually happened was that at 0412 on the morning of 3 July 1988, the *Vincennes* sent one of its helicopters into the Islamic Republic's internal waters to "observe" a number of small boats on coastal patrol that day[2]. These boats were operating routinely in the Persian Gulf within a short distance of the Iranian shore. Two hours later, the helicopter was still intruding into the Islamic Republic's territory[3], and it was allegedly warned off by the small boats. According to the Defense Department Report, the helicopter saw "several small flashes and puffs of smoke" and left the scene[4].

1.113 Both the Defense Department Report and Admiral Kelly in his testimony before the U.S. House of

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[1] Carlson, *op. cit.*, p. 92 (*Exhibit 23*).

[2] *ICAO Report*, Appendix A, p. A-1.

[3] *Ibid*. The approximate positions of the *Vincennes*' helicopter and the three U.S. warships, just prior to the incident with the small boats, at 0610-0615, are shown on *Fig. 5*. These positions are based on the coordinates and distances given in Appendix A of the ICAO Report.

[4] *Defense Department Report*, p. E-27.

Representatives have tried to create the impression that the small boats were in the process of attacking neutral shipping when the U.S. forces, led by the helicopter, intervened[1]. This story is also false. In fact, no merchant vessel was challenged for search and visit purposes on that day and the Defense Department Report specifically admits that "no merchant vessels requested assistance" during the relevant period[2]. Consequently, there was absolutely no justification for the *Vincennes*' helicopter to have flown into areas over the Islamic Republic's internal waters that day, or to have provoked the Islamic Republic's surface patrols.

1.114 Having sent a helicopter into the Islamic Republic's territory, and on the basis of a few warning shots allegedly fired at the helicopter, both the *Vincennes* and the *Montgomery* proceeded north "at high speed" to intercept the patrols[3]. The *Vincennes* opened fire first[4].

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[1] *Defense Department Report*, p. E-7; *House Hearings*, p. 87 (*Exhibit 10*).

[2] *Defense Department Report*, p. E-26.

[3] *Ibid*., p. E-7.

[4] Carlson, *op*. *cit*., p. 92 (*Exhibit 23*). *See*, also, *ICAO Report*, Appendix A, p. A-2.

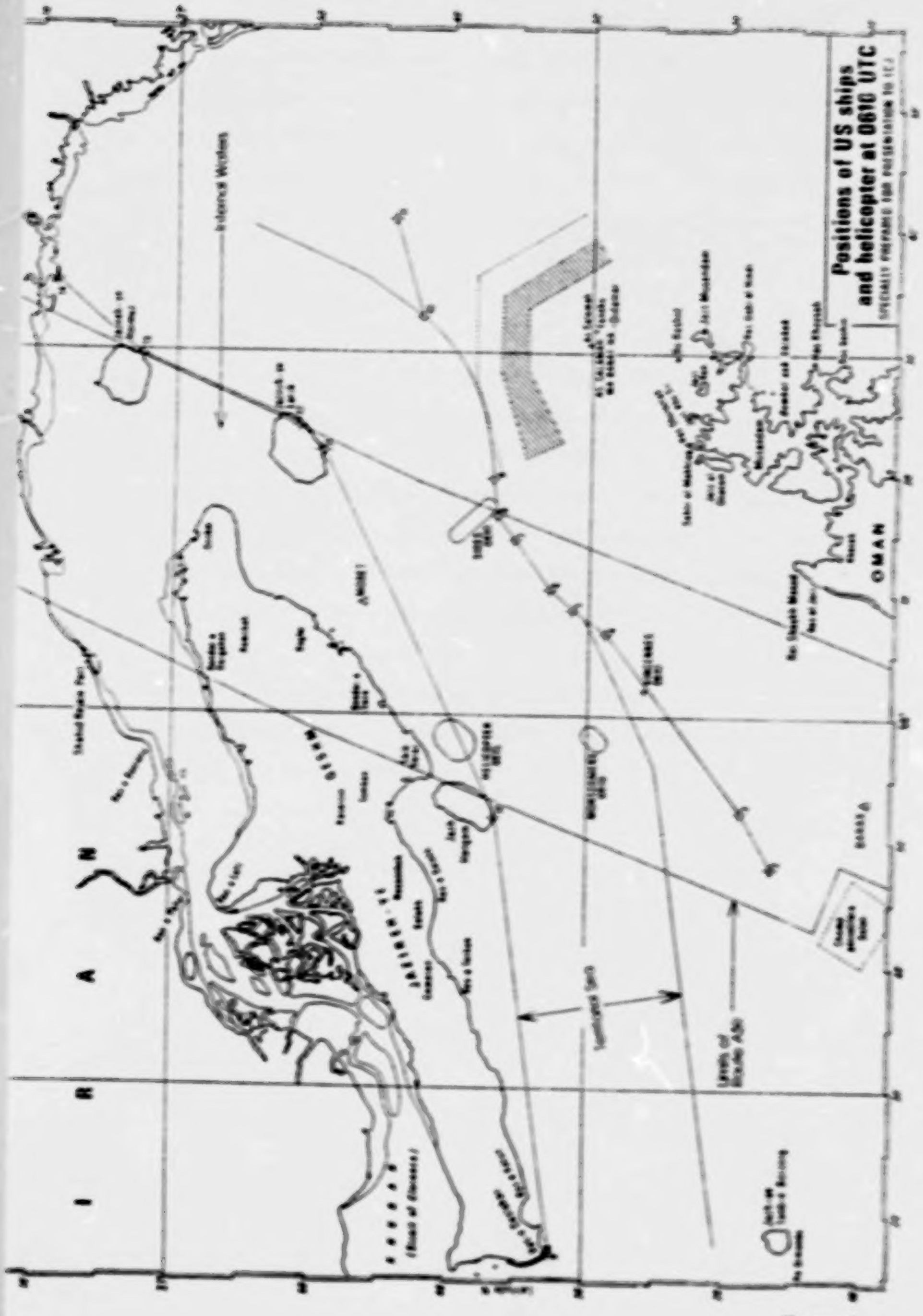
Positions of US ships
and helicopter at 0610 UTC
I R A N
O M A N
Internal Waters

Figure 5

Incredibly, even under the United States' version of events at no time did the small boats come closer than six kilometres (6,500-6,700 yards) to the U.S. warships[1], and none of the warships reported any damage from the engagement[2]. Nonetheless, the U.S. forces were still eager to press the attack.

1.115 How did the Commanding Officer of the Sides view these events? Observing that the number of patrol boats involved in the incident "grew, like Pinocchio's nose" with each new U.S. apologia, Commander Carlson concluded that the coordinated attack theory "does not pass a reasonableness test[3]". First, he noted that it was the Vincennes' helicopter which initially provoked the incident. In Commander Carlson's words, "the Vincennes' helicopter was just too damned close to the boats for its own good" (it was intruding into the Islamic Republic's internal waters) and "it was a nuisance to the (Iranian) boats[4]". Second, he confirmed that it was the Vincennes which fired first. Third, he suggested that the small boats never presented a threat to the U.S. ships[1]. His final observation as to what he sarcastically termed "this great surface battle" was that:

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[1] Senate Hearings, p. 47 (Exhibit 7).

[2] Ibid., p. 51.

[3] Carlson, op. cit., pp. 87-88 (Exhibit 23).

[4] Ibid., p. 92.

> "The Vincennes saw an opportunity for action, and pressed hard for Commander Middle East Force to give permission to fire. Deescalation went out the window. Equipment failed. The 'fog' rolled in...[2]".

1.116 It should be noted that there were no hostilities in the Persian Gulf on 3 July 1988, and the route of IR 655 was well outside of any declared war zone between Iran and Iraq. This is confirmed by the fact that route A59 was being used continuously by commercial carriers before and on the day of the incident, as has been shown above, and has continued to be used since the incident.

1.117 The Islamic Republic's civil air authorities obviously were well aware of the declared war zone in and above the northwest of the Persian Gulf, and, like other airlines, avoided the area. Moreover, in the interest of ensuring passenger safety, the Islamic Republic had initiated a "red alert" procedure whereby air traffic systems in the Islamic Republic were notified of all military activities which posed a potential safety hazard to civil aircraft[1]. When a "red alert" status was in effect, no air traffic clearances would be given and aircraft which had already taken off would be recalled[2]. However, this "red alert" procedure was applied to deal with attacks by Iraq, not the United States, which was supposed to be a neutral State whose sole role was allegedly to protect neutral shipping and who would thus not be expected to attack civilian aircraft in any circumstances.

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[1] Carlson, op. cit., p. 92 (Exhibit 23).

[2] Ibid. (emphasis in original).

1.118 On 3 July 1988, there was no "red alert" in effect and the air traffic control units at Tehran and Bandar Abbas were unaware of any activities at sea[3]. Even if they had been aware that a U.S. helicopter had been warned out of the Islamic Republic's internal waters early that morning, this would hardly have been grounds for a "red alert". With regard to the ensuing skirmish supposedly created when the Vincennes decided to steam northwards into the Islamic Republic's territorial waters directly underneath route A59, this occurred coincidentally with the flight of IR 655. This meant that civil air authorities would have had no time to declare a "red alert" even if the situation had warranted it. In fact, however, there was no apparent safety hazard to civil aircraft. IR 655 was where it was supposed to be on 3 July 1988. It was the Vincennes which, by its own acts of provocation, was where it had no business to be.

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[1] ICAO Report, para. 2.5.1.

[2] Ibid.

[3] Ibid.

PART II

JURISDICTION

2.01 This Part establishes the basis of the Court's jurisdiction in this case. As the Islamic Republic's Application made clear, jurisdiction exists under Article 36(1) of the Statute of the Court. Article 84 of the Chicago Convention provides for the appellate jurisdiction of the Court, while Article 14(1) of the Montreal Convention provides an independent and original basis of jurisdiction[1]. In this Memorial, the Islamic Republic also invokes provisions of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States[2]. Article XXI(1) of this Treaty provides an independent basis of jurisdiction for the Court.

2.02 Each of these bases of jurisdiction will be discussed below. Before doing so, it is necessary to review the procedural background to the dispute before ICAO. Insofar as this case involves an appeal under Article 84 of the Chicago Convention, the decision taken by the ICAO

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[1] The Islamic Republic and the United States are parties to both Conventions.

[2] A copy of the Treaty of Amity is attached at Exhibit 3.

Council provides the basis for the appellate jurisdiction of the Court.

A. The Procedural Background to the Dispute: Proceedings Before the ICAO Council

1. Initiatives of the Islamic Republic before ICAO

2.03 Immediately after the incident, the Islamic Republic took steps to raise the dispute before the ICAO Council. On 3 July 1988, the Islamic Republic's Vice-Minister of Roads and Transportation and Administrator of its Civil Aviation Organization sent a telex to the President of the Council informing him of the attack on IR 655 and requesting the Council to take effective measures in condemning the United States[1]. This was followed by a second telex from the Vice-Minister on the same day inviting the President and Members of the Council together with their experts to visit and study the incident[2].

2.04 On the same day, the Minister of Foreign Affairs of the Islamic Republic wrote to the Secretary-

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[1] A copy of this telex is attached at Exhibit 30.

[2] A copy of this telex is attached at Exhibit 31.

General of the United Nations expressing the Islamic Republic's outrage at the incident. He drew attention to the fact that the Islamic Republic had already warned the international community of the danger to civil aviation caused by the United States' presence in the Persian Gulf. He went on to state that "(t)his undoubtedly premeditated act of aggression by the United States against the civilian airliner of the Islamic Republic of Iran is in clear violation of all international rules and principles, particularly Articles 1 and 2 of the 1944 Chicago Convention, and seriously threatens civilian aviation in the region". He called on the Secretary-General to "mobilize pertinent international bodies", and to conduct an on-site investigation of the atrocity[1].

2.05 As has been seen, the immediate reaction from the United States was that its warships had acted properly and that the United States bore no blame[2]. Even when the United States' initial version of the "facts" was proved to be wrong, its position as to legal responsibility remained unchanged. From the outset, therefore, it was clear that a dispute between the Islamic Republic and the United States had emerged.

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[1] A copy of this letter is attached at Exhibit 32.

[2] See, paras. 1.96, et seq., above.

2.06 On 4 July 1988, the President of the ICAO Council replied to the Vice-Minister's telexes. In his reply, the President expressed his condolences to the Government of the Islamic Republic as well as to the families of the victims, and indicated that he would be taking steps to convene an Extraordinary Session of the Council to consider the requests of the Islamic Republic. He also added the following important statement, which the Islamic Republic took as reflecting an underlying principle of ICAO which would be applied in relation to the United States' action:

> "The policy of ICAO is aimed at the safeguarding of safety and regularity of civil flights along the approved ATS routes and is strongly opposed to the use of weapons against civil aircraft[1]."

2.07 In the light of the appalling nature of the event, this expression of ICAO's policy gave the Islamic Republic some measure of reassurance that the United States would be condemned by the Council for violating such a fundamental principle of international law and held accountable for all of the consequences, including full reparation, flowing therefrom. Regrettably, the Council failed to render the appropriate decision, thus precipitating the need for an appeal under Article 84 of the Chicago Convention.

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[1] A copy of this telex is attached at Exhibit 33.

2.08 On 5 July 1988, the President gave notice to the Representatives on the Council that an Extraordinary Session of the Council would be convened on 13 July 1988 to consider the Islamic Republic's requests.

2.09 Prior to the Extraordinary Session being held, the Islamic Republic's Representative to ICAO sent the President a compendium file of materials relating to the incident. These included a detailed Memorandum prepared by the Islamic Republic outlining a number of previous violations of international law committed by the United States in the Persian Gulf prior to its attack on IR 655. The Memorandum was supported by documentary exhibits, including correspondence with ICAO regarding the dangers caused by the United States' illegal conduct and the steps required to protect civil aviation in the region[1].

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[1] Copies of these materials as they were furnished by the Islamic Republic are attached at Exhibit 34. Selections from these materials were, in turn, circulated under Document No. C-WP/8644 on 8 July 1988 together with an Addendum on 12 July 1988, as a Working Paper of the ICAO Council. *See*, Exhibit 15.

2.10 The Memorandum thus drew attention to the fact that the act of shooting down IR 655 was not the only violation of international law by the United States (although the most outrageous), and that the IR 655 incident had to be viewed in the context of continuing U.S. breaches of international law. It specifically referred not only to general principles of international law in this respect, but also to the Chicago and Montreal Conventions. Finally, it called on the ICAO Council "to take appropriate measures against all these violations[1]".

2.11 Further materials were added to the file pursuant to two ICAO Working Papers dated 7 July 1988 and 12 July 1988[2]. The former document included details regarding the background to the incident, while the latter, presented by the Islamic Republic, contained technical materials about the shooting down of IR 655 including maps of the area and transcripts of radio communications between the pilot and ground control stations.

2.12 The Extraordinary Session of the Council was held on 13 July 1988. The President of ICAO commenced the proceedings by drawing attention to a number of fundamental aspects of the ICAO Charter (the Chicago Convention) relevant to IR 655[1]. In particular, he stressed that "(t)he fundamental principle that States must refrain from resorting to the use of weapons against civil aircraft must be respected by each State[2]".

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[1] See, page 5 of the Memorandum attached at Exhibit 15.

[2] See, Docs. C-WP/8643 and C-WP/8645, copies of which are attached at Exhibits 35 and 36, respectively.

2.13 The Representative of the Islamic Republic then took the floor and outlined the circumstances of the incident and the conduct of the United States in first trying to cover up the facts and, as the facts emerged, subsequently trying to shift blame on to the Islamic Republic[3]. He closed his intervention by presenting a request to the Council that it consider and deliberate five specific aspects of the incident. These were:

> "1. Explicit recognition of a delict of international character relating to the breach of international law and legal duties of a Contracting State, Member of ICAO.
>
> 2. Recognition of the fact that the Contracting State shall bear an

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[1] A copy of the Minutes of this Session (C-Min. EXTRAORDINARY (1988)/1) is attached at Exhibit 37.

[2] Ibid., p. 3.

[3] Ibid., pp. 4-8.

> international responsibility for the criminal actions of its officials, regardless whether they have acted within the limits of their authority or have exceeded it.
>
> 3. Explicit condemnation of the use of weapons against the Iran Air passenger aircraft by a member of ICAO, namely the United States.
>
> 4. Formation of an ad hoc commission to conduct an investigation of various legal, technical and other aspects of the shooting down of the Iran Air passenger aircraft to be reported, through the Council, to an Extraordinary Session of the Assembly for the purpose of taking necessary action in devising relevant rules, regulations and standards, as well as ensuring their proper and effective implementation for prevention of similar occurrence.
>
> 5. Demand for the immediate termination of present obstacles, restrictions, threats and use of force against the airspace of the Islamic Republic of Iran and the coastal States of the Persian Gulf, which endanger the safe and orderly operation of civil air transport in the region[1]."

2.14 The United States' Representative made it clear from the start that the United States did not accept the formulations presented by the Islamic Republic. He claimed that the United States might be prepared to provide some compensation to the families of the victims, but he conditioned this suggestion by saying that any payments would be subject to U.S. legal requirements and consultations with Congress. He also added that compensation would be made on an ex gratia basis "and not on the basis of any legal liability or obligation[1]". In support of his position, the U.S. Representative then introduced a series of factual allegations before the Council, all of which were subsequently shown to be false. These included the "fact" that the plane was transmitting a Mode II IFF response associated with an F-14, that it "was observed to alter a normal climb and began descending while heading rapidly toward him (the Vincennes)", and that the U.S. warships in the area were under "attack" by a number of small boats[2]. There is no need to add anything here to what was said in Part I about such allegations.

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[1] See, Exhibit 37, p. 7.

2.15 At this early stage, therefore, it was apparent that a dispute had crystallized before the ICAO Council between the positions of the Islamic Republic and the United States over the facts and their implications under the Chicago and Montreal Conventions and international law. Despite the view expressed by several Representatives that the United States should be condemned for using force against a civilian aircraft[1], the United States refused to acknowledge responsibility.

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[1] Exhibit 37, p. 8. As is clear from the Congressional hearings on the issue, the U.S. Congress was strongly opposed to paying any compensation.

[2] Ibid., p. 11.

2.16 The Extraordinary Session continued on 14 July 1988 and resulted in the issue of a summary of decisions taken by the Council. These included a reaffirmation of the "fundamental principle" that States must refrain from using weapons against civil aircraft and a decision to institute a fact-finding investigation[2].

2.17 On 19 July 1988, the Administrator of the Islamic Republic's Civil Aviation Organization sent a telex to the President of ICAO expressing the Islamic Republic's dissatisfaction with the outcome of the Extraordinary Session[3]. He drew attention to the Islamic Republic's position that "savage and irresponsible behaviour of a contracting State cannot go unpunished".

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[1] "A gross violation of the fundamental principles of international law and also of the Chicago Convention to which the Government of the United States has been a signatory since 1947" was the way in which the Czechoslovakian Representative put it; see, Exhibit 37, p. 15.

[2] C-DEC EXTRAORDINARY (1988)/2, pp. 1-2. A copy of this document is attached at Exhibit 38.

[3] A copy of this telex is attached at Exhibit 39.

2. Subsequent Actions by ICAO

2.18 Two key aspects of the Islamic Republic's request to the ICAO Council were that the Council should consider (i) the provision of rules, regulations and standards, whose proper and effective implementation could be ensured, to prevent similar occurrences; and (ii) the immediate termination of all obstacles, restrictions and other threats and use of force against civil aviation in the Persian Gulf region.

2.19 Pursuant to one of the decisions which had been taken at the Council's 13-14 July 1988 Extraordinary Session, a meeting was convened in the Paris office of ICAO on 6 October 1988 to review some of these matters, in particular the provision of air traffic control services on route A59 in the aftermath of IR 655's destruction[1]. The meeting was attended by representatives of the responsible authorities in the region - the Islamic Republic and the United Arab Emirates - as well as by represenatives of the International Federation of Airline Pilots Association and the International Air Transport Association.

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[1] A copy of an official summary of this meeting is attached at Exhibit 40.

2.20 Amongst other business, the meeting considered the NOTAM for the Persian Gulf area which had been issued by the United States in 1984 and its amendment of 1987, against both of which the Islamic Republic had strongly protested[1]. The summary of the meeting contains the following conclusion in this respect:

> "The meeting expressed its belief that this NOTAM is in contravention of approved ICAO Standards and Recommended Practices. The meeting disagreed with this practice by the United States. It stressed that the promulgation of aeronautical information is the responsibility of the appropriate ATS authority of the States which provide services in the FIRs concerned, including the airspace extending over the high seas, in accordance with relevant ICAO provisions and the Air Navigation Plan of ICAO[2]."

2.21 The 6 October 1988 meeting also found that the procedures that had been applied by both the Islamic Republic and the United Arab Emirates for coordinating air traffic control services with military activities met ICAO provisions[1].

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[1] See, paras. 4.15, et seq., below.

[2] The ICAO Report also determined that the United States' NOTAM was contrary to established rules. In particular, it stated that "the promulgation of the NOTAM was not in conformity with the provisions of ICAO Annex 15". ICAO Report, para. 2.2.4. The correctness of this conclusion was also confirmed by ICAO's Air Navigation Commission in its subsequent meetings on the incident in February 1989.

2.22 As will be discussed in more detail in Part IV, these findings have a significant bearing on the actions of the United States. For it has been established by ICAO that the proper procedures were being followed on the day of the incident by the littoral States along the Persian Gulf including the Islamic Republic and the United Arab Emirates - the two States most directly involved with IR 655's flight plan. It was the United States which failed to adhere to and implement the relevant provisions and safety recommendations of the Chicago Convention and its Annexes. This was one of the contributing factors to IR 655's subsequent destruction.

2.23 On 7 November 1988, the President of the ICAO Council and the Secretary General presented to the

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[1] This conclusion was also endorsed by the Air Navigation Commission at its session of 9 February 1989 where it stated that-

> "the current provisions and special recommendations were adequate and, if properly implemented and applied by all concerned, were capable of providing the necessary safety protection for civil aircraft".

Minutes of the 8th Meeting of the Air Navigation Commission on 9 February 1989, Doc. AN Min. 120-8, p. 2 (a copy is attached at Exhibit 41).

Council the Report of the fact-finding investigation which had been commissioned pursuant to the Council's decision of 14 July 1988. The main findings of this Report have been discussed in Part I above.

2.24 A further ICAO Council meeting was convened for 5-7 December 1988 to consider the Islamic Republic's request that the United States be condemned, that its responsibility under international law be recognized, that reparation for moral and financial damages be ordered, that safety measures be implemented to prevent the repetition of such an incident and that continuing U.S. violations and threats in the Persian Gulf be terminated. In advance of this meeting, the ICAO Report was circulated together with a working paper summarizing the various actions that had been taken under ICAO's auspices since the 13 July Extraordinary Session[1].

2.25 At the meeting of 5-7 December, the ICAO Report was considered and the Representatives of both the Islamic Republic and the United States made statements. At the close of the session, the Council took an interim decision, the text of which is reproduced in the document attached at Exhibit 43. Without repeating each of the individual points raised in that decision, it is appropriate to note that item 6 indicated that the Council:

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[1] A copy of this working paper, Doc. C-WP/8718, is attached at Exhibit 42.

> "Reaffirmed again the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft[1]".

2.26 During the December session, the United States again advanced its contention that "(t)he Vincennes was operating lawfully from the strait of Hormuz and was under attack by Iranian boats when the incident occurred[2]". This contention has been effectively rebutted by the Captain of one of the U.S. ships (the Sides) that participated in the July 3 events, who stated that the small boats posed no threat to U.S. warships[3].

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[1] Summary of the Fourteenth Meeting on 7 December 1988, Doc. C-DEC 125/14, p. 4, a copy of which is attached at Exhibit 43.

[2] Minutes of the Thirteenth Meeting on 7 December 1988, Doc. C-Min. 125/13 (Closed), pp. 4-5, a copy of which is attached at Exhibit 44.

[3] See, paras. 1.111 and 1.115, above.

2.27 As for the Representative of the Islamic Republic, he pointed out that the offer of an ex gratia payment by the United States would leave no doubt that the United States was not accepting its legal liability for the shooting down of IR 655 despite the findings of the ICAO Report and the fact that the attack took place within the Islamic Republic's internal waters and territorial sea[1]. In subsequent remarks, the Islamic Republic's Representative noted that his Government was holding to its position that the U.S. action must be condemned and appropriate reparations made. He added that the Islamic Republic expected that ICAO's Legal Bureau would be examining the Report "to identify infringements of legal principles which have been committed[2]", and he closed by saying that the Islamic Republic specifically requested the Council to determine four points:

> "1) Condemnation of the shooting down of IR 655 by the United States military forces in the Persian Gulf.
>
> 2) Explicit recognition of a crime of international character to the breach of

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[1] See, Exhibit 44, at p. 13.

[2] Ibid., p. 19. See, also, the Statement of the Islamic Republic's Representative at the session on 5 December 1988, Minutes of the Twelfth Meeting, Doc. C-Min. 125/12 (Closed), pp. 29-31. A copy of this document is attached at Exhibit 45.

> international law and legal duties of a Contracting State of ICAO.
>
> 3) Explicit recognition of the responsibilities of the United States Government, and calling for effecting compensation for moral and financial damages.
>
> 4) Demand for the immediate termination of present obstacles, restrictions, threats, and the use of force against civilian aircraft in the region, including Council's appeal to relevant international bodies to demand the withdrawal of all foreign forces from the Persian Gulf."

2.28 A number of delegations rose in support of the call to condemn the United States for its conduct under the Chicago Convention and international law. The Representative of the Soviet Union, for example, maintained that there was "every justification" to condemn the act[1]. The Chinese Representative was equally unequivocal, stating:

> "With regard to the destruction of Iran Air flight 655 by a United States warship ... the position of the Chinese Government is very clear. We condemn this act and believe that the US Government has unshirkable responsibility for the incident. Therefore, it is right and proper that compensation should be paid for the loss of lives and property in the incident[2]."

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[1] See, Exhibit 45, p. 20.

[2] Ibid., p. 28.

2.29 At the December meeting the Council also instructed the Air Navigation Commission to study the safety recommendations contained in the ICAO Fact-Finding Report[1]. This instruction complied in part with the Islamic Republic's request that safety measures should be considered to prevent similar incidents recurring. However, in restricting the Air Navigation Commission's mandate to a consideration of the one page of Safety Recommendations given on page 25 of the ICAO Report, the Council severely restricted the effectiveness of the Commission's efforts.

2.30 This instruction differed materially from the mandate that the Air Navigation Commission had been given by the Council during its investigation of the 1983 KAL 007 incident. At that time, the Air Navigation Commission had been given free rein to review the entire fact-finding report, not just its safety recommendations, and had concluded that there was no justification to shoot down the aircraft in question. Subsequently, ICAO condemned the State responsible.

2.31 In this case, however, the Air Navigation Commission was not permitted to give its opinion on the fact-finding report as a whole. This led the Soviet Representative to complain that the Air Navigation Commission had been hampered in its work by the limitations imposed by the Council[1], and it constitutes an example of how with respect to IR 655 the Council departed from ICAO's previous practice in examining incidents involving the use of armed force against civil aircraft. It is also noted that the Legal Bureau's examination of the ICAO Report, which had been requested by the Islamic Republic, never materialized, despite the general agreement of the Council that such an examination be conducted.

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[1] See, Exhibit 43, p. 2.

2.32 In February 1989, the Air Navigation Commission issued its final report, which was placed at the Council's disposal when it rendered its final decision on the dispute in March 1989[2]. The Commission concluded its report as follows:

> "... the current ICAO provisions are adequate in relation to military activities which are potentially hazardous to civil aircraft and, if

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[1] Minutes of the Air Navigation Commission's 6th Meeting on 2 February 1989, Doc. AN Min. 120-6, p. 2, a copy of which is attached at Exhibit 46.

[2] See, Doc. C-WP/8803, a copy of which is attached at Exhibit 47. Indeed, a number of representatives referred to it in their individual presentations.

> properly implemented and applied by all concerned, are capable of providing the necessary safety protection for civil aircraft[1]."

The clear implication of this report was that one of the main reasons IR 655 had been shot down was because the ICAO provisions had not been properly implemented and applied by the United States. However, since the Commission had not been asked to review the ICAO Report itself, it was not in a position to judge that it was the United States who had been at fault[2].

3. The Final Decision of the ICAO Council

2.33 The final series of meetings of the ICAO Council on the incident took place from 13-17 March 1989, when a draft Council Resolution was considered. On 15 March 1989, the Representative of the Islamic Republic stated that the mandate of the Chicago Convention compelled the Council to take a serious position. He regretted the fact that up to that point the Council had not taken such a stand, and he indicated that the only way for the Council to fulfil its duties under the Chicago Convention was to condemn the United States' act of shooting down a passenger aircraft - all the more so since the plane had been downed in an area over which the Islamic Republic exercised full sovereignty[1].

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[1] See, Exhibit 47, para. 2.8.1.

[2] As a result of various objections, including the findings of the ICAO Report itself, the United States promised to cancel its illegal NOTAM. See, Minutes of the Eighteenth Meeting on 13 March 1989, Doc. C-Min. 126/18, p. 10, a copy of which is attached at Exhibit 48. In fact, this was not effectively carried out. See, paras. 4.27-4.28 below.

2.34 On 17 March 1989, the Soviet Union proposed an amendment to the draft Resolution condemning the use of armed force against civil aviation, including the act which destroyed IR 655[2]. The United States opposed this amendment, which was ultimately defeated.

2.35 As its final action on the dispute the Council then adopted the text of the Resolution which follows:

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[1] Minutes of the Nineteenth Meeting of the ICAO Council on 15 March 1989, Doc. C-Min. 126/19, p. 3. A copy of this document is attached at Exhibit 49.

[2] Summary of the Twentieth Meeting on 17 March 1989, Doc. C-DEC 126/20, p. 1. A copy of this document together with the Minutes of the meeting is attached at Exhibit 50.

" RESOLUTION ADOPTED BY THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AT THE 20TH MEETING OF ITS 126TH SESSION ON 17 MARCH 1989

THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Recalling its decisions of 14 July and 7 December 1988 concerning the shooting down, on 3 July 1988, of Iran Air Airbus 300 on flight IR655 by a warship of the United States;

Having considered the report of the fact-finding investigation instituted by the Secretary General pursuant to the decision of the Council of 14 July 1988 and the subsequent study by the Air Navigation Commission of the safety recommendations presented in that report;

Expressing appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned;

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

Reaffirming its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations;

Deeply deplores the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;

Expresses again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families;

Appeals again urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* into the Convention on International Civil Aviation;

> Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;
>
> Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft[1]."

2.36 This decision was inadequate in the light of the gravity of the offence which had been committed because it failed to direct the United States to ensure that its activities in the Persian Gulf complied with the provisions for the safety of civil aviation set out in the Chicago Convention and its Annexes. It was also plainly wrong because it failed to apply to the conduct of the United States the relevant principles and rules of international law reflected in the Chicago Convention in the same way that they had been applied in earlier ICAO Council decisions relating to other aerial incidents. While it will be necessary to revert to these incidents later on in this Memorial, two examples deserve mention here because they show very clearly the unequal and inconsistent application of justice by the ICAO Council with respect to IR 655.

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[1] A copy of this Resolution was attached to the Islamic Republic's Application.

2.37 The first involved the destruction of a Libyan Airlines civil aircraft by Israeli military forces over the Israeli-occupied Sinai Peninsula in 1973. In that case, the ICAO Council showed no hesitation in condemning Israel's action. This was evidenced by the Council's Resolution on the incident which, in relevant part, read as follows:

> "THE COUNCIL ...
>
> CONVINCED that such action constitutes a serious danger against the safety of international civil aviation;
>
> RECOGNIZING that such attitude is a flagrant violation of the principles enshrined in the Chicago Convention;
>
> HAVING considered the report of the investigation team established by the Secretary General in accordance with the Resolution A19-1, and finding from it no justification for the shooting down of the Libyan civil aircraft;
>
> 1) *Strongly condemns* the Israeli action which resulted in the destruction of the Libyan civil aircraft and the loss of 108 innocent lives;
>
> 2) *Urges* Israel to comply with the aims and objectives of the Chicago Convention[1]."

2.38 The second incident involved the Council's condemnation of the use of armed force by the Soviet Union with respect to the downing of Korean Airlines flight 007 ("KAL 007") which had strayed over the Soviet Union's airspace on 1 September 1983. In relevant part, the Council's Resolution in connection with this incident read as follows:

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[1] A copy of this Resolution, *reprinted in* XII *I.L.M.* 1180 (1973), is attached at *Exhibit 51*.

> **"THE COUNCIL ...**
>
> **__REAFFIRMING__ that, whatever the circumstances which, according to the Secretary General's report, may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized legal consequences;**
>
> **__RECOGNIZING__ such use of armed force is a grave threat to the safety of international civil aviation, and is incompatible with the norms governing international behavior and with the Rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and with elementary considerations of humanity...**
>
> __CONDEMNS__ the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives[1]...".

2.39 Both of these incidents involved the use of force by an ICAO member against an intruding aircraft which had strayed from its flight route over highly sensitive areas of territory belonging to, or occupied by, the offending member. In contrast, IR 655 was shot down in its own airspace and within an internationally recognized air corridor by military forces operating thousands of miles from their own territory. In these circumstances, the Islamic Republic was entitled to expect that the ICAO Council would, if anything, take an even stronger position condemning the United States' actions than it had in previous incidents.

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[1] **A copy of this Resolution, __reprinted in__ XXIII __I.L.M.__ 937 (1984), is attached at __Exhibit 52__.**

2.40 **This was not the case.** The Council's decision contained no condemnation of the United States and no recognition that such actions constituted a violation of principles of international law embodied in the Chicago Convention, let alone of "norms governing international behavior" or "elementary considerations of humanity"[1].

2.41 This manifestly inconsistent decision reflected a failure by the Council to address the Islamic Republic's application in an even-handed manner as was required by considerations of justice and fairness, and under the fundamental principle of the equality of States.

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[1] See, E. Sochor, "ICAO and Armed Attacks against Civil Aviation", XLIV International Journal (Winter 1988-89), p. 158, where the author notes the "inconsistency of the ICAO responses to this type of incident".

As will be explained in the next section, one of ICAO's shortfalls in this respect results from the fact that the Council is authorized to perform a judicial function while, at the same time, its composition is heavily weighted by political factors, including a pronounced bias in favour of what Article 50(b) of the Chicago Convention terms "the States of chief importance in air transport". A number of respected commentators have pointed out that the ICAO judicial process contains a basic flaw in that Council members, who are agents of their governments, cannot be expected to sit as impartial judges[1]. According to one commentator, this is exactly what happened in the case of IR 655:

> "This curious formula (the Council's decision) was in fact a concession to the United States which let it be known that it would not go along with any text that would invite comparisons with the KAL affair[2]."

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[1] *See*, M. Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)", in *Studies on Air and Space Law* (1979); T. Buergenthal, *Law-making in the International Civil Aviation Organization* (Syracuse Univ. Press, 1969), Pt. III; J. Schenkman, *International Civil Aviation Organization* (1955).

[2] Sochor, *op. cit.*, p. 166.

2.42 In these circumstances, the Court is not only empowered, it is bound, to exercise its supervisory powers over the Council's decisions under Article 84 of the Chicago Convention.

B. Jurisdiction Under the Chicago Convention

2.43 The Court's jurisdiction under the Chicago Convention derives from Article 84 thereof, which appears within Chapter XVIII of the Convention entitled "Disputes and Default". It provides:

> "Settlement of disputes
>
> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

2.44 Under this Article, three conditions must be met before the Court's jurisdiction may be engaged. First, there must be a disagreement between two or more contracting States relating to the Convention's interpretation or application. Second, it must appear that the disagreement cannot be settled by negotiation. Third, the dispute must be submitted to the ICAO Council by any State concerned in the disagreement and the Council must render a decision. If these conditions are met, then the right of appeal automatically vests. In other words, any contracting State may appeal as a matter of right from the Council's decision either to an *ad hoc* tribunal agreed with the other party (or parties) to the dispute or, if the contracting State so elects, to the Court, provided that this is done within sixty days of receipt of notification of the Council's decision[1].

2.45 In the present case, all three conditions were satisfied before the Islamic Republic instituted these proceedings. Moreover, the Application was timely inasmuch as it was filed on 17 May 1989 and notified to the Council two months after the Council's decision was rendered.

2.46 With respect to the first point, a "dispute" or "disagreement" between the Islamic Republic and the United States over the interpretation and application of the Chicago Convention crystallized immediately after IR 655 was shot down. The Islamic Republic's very first communication to the President of the Council in which ICAO was notified of the event (the telex sent by the Iranian Vice-Minister of Roads and Transportation on 3 July 1988) requested the Council "to take effective measures in condemning (the United States') hostile and criminal acts[1]". At the same time, the United States was denying responsibility for the incident[2].

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[1] *See*, in this respect, Bin Cheng, *The Law of International Air Transport* (Stevens & Sons, London, 1963), p. 104.

2.47 The Islamic Republic's claims were made more precise in the formal requests that it subsequently presented to the Council on 13 July 1988 and 5 December 1988[3]. All of these requests related to the dispute that had arisen with respect to the interpretation and application of the Chicago and Montreal Conventions in relation to the acts of the United States. As stated above, the United States took issue with this position in its public statements as well as in the debate before the ICAO

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[1] See, para. 2.03, above.

[2] See, paras. 1.96, et seq., above.

[3] See, paras. 2.13 and 2.27, above.

Council. Subsequently, the United States went so far as to oppose the amendment which was proposed by the Soviet Union on 17 March 1989 calling for the condemnation of the use of armed force against civil aviation including the act which destroyed IR 655.

2.48 The Court will appreciate that the text of this amendment, which went part but not all of the way towards meeting the Islamic Republic's requests, was very similar to paragraph 1 of the operative part of the Resolution that the Council adopted on 6 March 1984 concerning the KAL 007 incident. When the amendment was proposed, therefore, the issue was immediately raised whether with respect to IR 655 the Chicago Convention would be interpreted and applied in the same way as it had been vis-à-vis KAL 007.

2.49 If any doubt remained as to the United States' position on this point, it was put to rest by its objection to the amendment. This action made it even clearer that there existed a fundamental difference between the Islamic Republic and the United States over the interpretation and application of the Chicago Convention with respect to IR 655. The Council then took its final decision on the dispute when it adopted its Decision of 17 March 1989. This Decision did not meet any of the requests submitted by the Islamic Republic. It failed to condemn the United States' use of force and to recognize the United States' responsibilities under international law for this act. It failed to call on the United States to take steps to ensure that such an incident would not be repeated in the Persian Gulf region. Moreover, it was inconsistent with the Council's previous decisions regarding armed attacks on civil aircraft.

2.50 It is also apparent that the dispute which had arisen could not be settled by negotiation - the second prerequisite for an appeal under Article 84. The minutes of the ICAO Council sessions demonstrate that the Islamic Republic and the United States held fundamentally different positions which could not be reconciled during the exchanges before the Council. Moreover, from the nature of the debate before the U.N. Security Council and from other public statements issued by U.S. spokesmen, it was apparent that settlement by other forms of negotiation was also not possible - an impasse which was heightened by the fact that the United States had broken off diplomatic relations with the Islamic Republic since early 1980.

2.51 In this connection, it is worth noting that it was not until two months after the Islamic Republic filed its Application before the Court that the United

States was prompted to make a concrete offer of an ex gratia payment direct to the relatives of the victims through an intermediary rather than to the Islamic Republic. This offer related only to immediate relatives of the victims, and contained nothing with respect to other relatives of the victims, the destruction of the aircraft, the violation of the Islamic Republic's territorial sovereignty and other related damages. Such an offer was unacceptable to the Islamic Republic.

2.52 The Permanent Court has already discussed the scope of the requirement for prior negotiations between States in its judgment in the Mavrommatis Palestine Concessions case[1]. The Court held:

> "The Court realizes to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it ... Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation[2]."

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[1] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.

[2] Ibid. p. 15; and see, paras. 2.64-2.71, below.

The Court then added the following pertinent observations:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches, it may suffice that a discussion should have been commenced and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation[1]."

2.53 The third prerequisite for making an appeal under Article 84 - the requirement that the disagreement be submitted to the Council which takes a decision on it - has also been met. The Islamic Republic submitted its application on the matter to the Council in the form of several requests, memoranda and accompanying documents, and the Council rendered its decision on 17 March 1989.

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[1] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 13 (emphasis in the original). See, also, Right of Passage over Indian Territory, (Preliminary Objections), Judgment, I.C.J. Reports 1957, pp. 148-149; and T. Buergenthal, op. cit., where the author notes that, "The requirement of prior negotiations does not necessarily demand that the parties engage in direct negotiations. It could undoubtedly also be satisfied by negotiations carried on in a parliamentary or conference forum, provided both parties to the dispute participated therein on opposite sides" (p. 131).

2.54 Two aspects of that decision should be noted. First, as the ICAO Council Annual Report for 1989 makes clear, the decision rendered on 17 March 1989 was a final decision. The Annual Report indicates that "(t)he Council completed its action on the subject of the Iran Air flight 655 incident" after it had reviewed the various reports and issued its resolution of 17 March 1989[1]. Second, when the Council took its decision, it had a full file before it. This included all of the materials furnished by the Islamic Republic in July 1988 relating to the unlawful conduct of United States forces in the Persian Gulf leading up to the shooting down of IR 655, together with the ICAO fact-finding Report, the Report of the Air Navigation Commission and numerous statements by the Representatives of both Parties. Based on this information, the Council was in a position to determine which Party had violated the applicable principles embodied in the Chicago Convention and what consequences flowed therefrom. The fact that it failed to take the appropriate decision, in stark contrast to its previous decisions, provides ample jurisdictional grounds for an appeal in this case.

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[1] Doc. 9530 - Supplement (July 1989), p. 23. A copy of this page is attached at Exhibit 53.

2.55 Indeed, the Court has made it clear in its judgment in the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) case[1] (the "Appeal" case) that it will take a broad, facultative approach to the exercise of its own jurisdiction over decisions of the ICAO Council. The Appeal case has special relevance because it is the only case previously to come before the Court on appeal from a decision of the ICAO Council. Because the case was one of first impression, the Court deemed it appropriate to make what it termed "a few observations of a general character on the subject[2]" which, because of their general nature, apply with equal force to the present case.

2.56 One element which the Court emphasized is that while a case such as this one "is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it), (y)et in the proceedings before the Court, it is the act of a third entity - the Council of ICAO - which one of the Parties is impugning and the other defending[3]". This led the Court to state the following:

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[1] Judgment, I.C.J. Reports 1972, p. 46.

[2] Ibid., p. 60, para. 26.

[3] Ibid.

> "In that aspect of the matter, the appeal to the Court contemplated by the Chicago Convention ... must be regarded as an element of the general régime established in respect of ICAO. In thus providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application ... the Chicago Treaties gave member States, and through them the Council, the possibility of a certain measure of supervision by the Court over those decisions[1]."

2.57 As the Court observed, the "measure of supervision" which it is empowered to exercise over decisions of the Council exists "for the good functioning of the Organization[2]". This is especially significant because, on the one hand, the Council performs a judicial or quasi-judicial function[3] while, on the other, it also has an important political component which is reflected in the substantial weighting in the Council's composition in favour of certain States (including the United States) over others (including the Islamic Republic).

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[1] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 60, para. 26.

[2] Ibid.

[3] See, Bin Cheng, op. cit., pp. 100-101; see, also, the Declaration made by Judge Lachs in the Appeal Relating to the Jurisdiction of the ICAO Council case, Judgment, I.C.J. Reports 1972, pp. 74-75.

2.58 Article 50(b) of the Chicago Convention bears this out. In relevant part, it provides that:

> "In electing the members of the Council, the Assembly shall give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all major geographic areas of the world are represented on the Council."

2.59 The existence of this bias in favour of "the States of chief importance in air transport" provides an even stronger policy rationale for the Court to exercise its supervisory role over Council decisions. It is precisely to review and correct inconsistent decisions such as the one rendered by the Council with respect to IR 655 that the Court should exercise its jurisdiction. This is necessary in order to avoid double standards and to impart a legal framework upon decisions which might otherwise be influenced by political or other non-legal considerations.

2.60 This necessarily means that the scope of the Court's review must be broad. In treating an appeal under Article 84 the Court does not act as a cour de cassation. Rather, Article 84 entrusts the relevant appellate body, in this case the Court, with all the power of decision of the lower body, together with any powers and remedies which are invested in the appellate body. As one authority on ICAO has put it:

> "Since the Convention does not, however, limit the powers of the appellate tribunal, it can be concluded that the tribunal may review any findings of law and/or fact made by the ICAO Council[1]."

This is what the Islamic Republic is asking of the Court in this case.

C. Jurisdiction Under the Montreal Convention

2.61 The Islamic Republic also submits that by virtue of the United States' conduct in destroying IR 655 and in failing to take all practical measures to prevent such an offence and to make it punishable by severe penalties, the United States violated Articles 1, 3 and 10(1) of the Montreal Convention. The text of these articles and the reasons why the United States must be considered to have breached them will be taken up in the next Part.

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[1] Buergenthal, op. cit., p. 145.

2.62 From the foregoing discussion, it is evident that a dispute exists between the Islamic Republic and the United States over the interpretation and application of the Montreal Convention. As early as 8 July 1988 when the Islamic Republic submitted a Memorandum to ICAO on the incident, it charged the United States with violating the Montreal Convention[1]. This dispute came to a head early on in the proceedings before the ICAO Council when the Islamic Republic alleged breaches of the Montreal Convention and the United States objected.

2.63 The very fact that the United States denies any legal responsibility for its actions evidences the existence of a dispute within the meaning of Article 14(1), which reads as follows:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

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[1] See, para. 2.10, above.

In these circumstances, Article 14(1) of the Montreal Convention provides a further, independent basis for the Court's jurisdiction.

2.64 As noted above, it is not necessary for formal negotiations to have taken place between the Parties in order for the Court's jurisdiction to vest. Indeed, the Permanent Court's judgment in the Mavrommatis Palestine Concessions case made it very clear that-

> "No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case[1]."

2.65 In the present case, the extent of public debate over the illegality of the United States' actions - whether before the United Nations, the ICAO Council or in other pronouncements - coupled with the fact that no diplomatic relations exist between the two countries, demonstrates that it would be fruitless to hope that any further "negotiation" could be expected to settle the dispute. Under Article 14(1), therefore, it is appropriate to submit the dispute to the Court.

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[1] Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 13.

2.66 By the same token, it would be unrealistic to suppose that the Parties could agree on the organization of a separate arbitration within the six-month deadline provided for in Article 14(1). Throughout the period from 3 July 1988, when IR 655 was shot down, to 17 May 1989, when the Islamic Republic's Application was filed, the United States gave absolutely no indication that it was interested in or amenable to an ad hoc arbitration of the dispute. Once that Application was filed, the United States was on further notice that the Islamic Republic had a claim regarding the interpretation and application of the Montreal Convention. Still the United States took no steps suggesting that it would be interested in arbitrating such a claim separately. Of course, even if the United States had shown a modicum of interest in such a procedure, there still would have remained the difficult, if not impossible, task of agreeing to the composition of the arbitral tribunal, its rules of procedure, and the place of arbitration in the absence of a provision for an appointing authority - a task which could well have taken more than six months, if it had been feasible at all.

2.67 It is important to recall that in the United States Diplomatic and Consular Staff in Tehran case, the United States admitted in its Memorial that a temporal arbitration provision (in that case appearing in Article 13 of the Convention on the Prevention of Crimes Against Internationally Protected Persons) was inapplicable. The United States stated:

> "This limitation on the court's jurisdiction can have no application in circumstances such as these, where the party in whose favour the six months' rule would operate has by its own policy and conduct made it impossible as a practical matter to have discussions related to the organization of an arbitration, or, indeed, even to communicate a direct formal request for arbitration. It is submitted that when such an attitude has been manifested, an application to the Court may be made without regard to the passage of time[1]."

2.68 By the time this Memorial is filed, two years will have elapsed since the incident took place. Yet the United States still has given no indication that a separate arbitration would be its preferred route. The fact that a separate arbitration is not feasible cannot allow the United States to continue to violate the Convention and to bar the Islamic Republic from recourse to the Court now.

2.69 Here, again, it is instructive to recall what the United States said about a similar situation in the

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[1] I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, Memorial of the United States, p. 155.

United States Diplomatic and Consular Staff in Tehran case. There, the United States contended that even if the Optional Protocols which were then in issue were interpreted as requiring a two-month waiting period "for the benefit of a respondent who genuinely desired arbitration or conciliation, adherence to that interpretation would not call for dismissal of the United States Application at this stage of the proceedings[1]". In support, the United States cited the judgment in the Mavrommatis case where the Permanent Court had rejected a challenge to its jurisdiction even though one of the instruments necessary to found its jurisdiction (Protocol XII of the Treaty of Lausanne)had not yet been ratified when the application was filed. It was ratified and entered into force only before the judgment was rendered. The Court held that -

> "... It would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for this dismissal of the applicant's suit[2]."

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[1] I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, Memorial of the United States, p. 151.

[2] Ibid., citing Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 34.

2.70 The same reasoning applies here. For if it were held that the six-months time limit provided for in the Montreal Convention had somehow not been satisfied, it would simply be open to the Islamic Republic to re-submit its Application in the same terms in another six months and then request a joinder of that case with the present one under Article 47 of the Rules of Court. Moreover, the dispute in the present case is so intertwined with violations of obligations under other treaties and general international law that the Court is the only competent forum to deal with it[1].

2.71 It was for these reasons, therefore, that the Islamic Republic noted in its Application that the arbitration referred to in Article 14(1) of the Montreal Convention cannot be considered as a viable course of action or an obstacle to the Court's jurisdiction here. This being the case, the dispute is ripe for adjudication by this Court.

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[1] Of course, once the Islamic Republic's Application was filed, the United States was on notice as to the Islamic Republic's choice of forum. Had it wanted to arbitrate the dispute, the United States could within six months thereof have concluded a special agreement with the Islamic Republic conferring specific jurisdiction on the Court under Articles 36 and 40 of the Court's Statute.

D. Jurisdiction under the Treaty of Amity

2.72 In this Memorial, the Islamic Republic also invokes provisions of the 1955 Treaty of Amity between Iran and the United States which it submits have been violated by the United States. Article XXI(2) of the Treaty of Amity contains the relevant compromissory clause. It provides:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

2.73 Before dealing with the substantive provisions of the Treaty which have been breached by the United States and which thereby give rise to a dispute as to the Treaty's interpretation and application, there are two preliminary matters requiring comment. These concern (i) the general applicability of the Treaty of Amity as a basis of jurisdiction and the position of the Islamic Republic in this respect; and (ii) the fact that the Treaty was not mentioned in the Islamic Republic's Application.

2.74 With respect to the first point, it is to be noted that in a number of cases before the Iran-United

States Claims Tribunal, the Treaty of Amity was invoked by some U.S. claimants against the Islamic Republic itself and other Iranian respondents. There, the Islamic Republic invited the Tribunal to declare that the United States, by its unabated hostilities towards the Islamic Republic, and by its repeated violations of the basic provisions of the Treaty of Amity, had in effect denounced the Treaty of Amity. This submission was rejected, and the Tribunal, upholding the continued applicability of the Treaty, proceeded on a number of occasions to find the Islamic Republic liable to U.S. claimants under the provisions of the Treaty[1].

2.75 This Court has already held in the United States Diplomatic and Consular Staff in Tehran[2] case that the Treaty of Amity provides a jurisdictional ground for the Court to entertain a unilateral application by one of the contracting parties concerning the interpretation or application of the Treaty[3]. The Court indicated:

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[1] The Islamic Republic has not burdened the Court with the numerous citations that are available from the Iran-U.S. Claims Tribunal which bear this point out, but reserves its right to do so if the United States takes issue with the Treaty's application in this case.

[2] Judgment, I.C.J. Reports 1980, p. 3.

[3] Ibid., p. 27, para. 52.

> "It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means[1]."

The Court went on to state:

> "It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed[2]."

And it added:

> "Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran[3]."

2.76 Finally, it should be noted that the United States has consistently regarded the Treaty as remaining in force. This is clear from two Memoranda prepared by the Legal Adviser of the State Department in 1983 and 1984 which show that the United States has continued to consider the Treaty to be in force[1]. In fact, conclusive proof of the United States' position is found in the State Department's yearly publication, Treaties in Force, which for 1988 and 1989 lists the Treaty of Amity as still in force[2].

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[1] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 28, para. 54.

[2] Ibid.

[3] Ibid.

2.77 Under these circumstances, where the continued enforceability of the Treaty has been upheld by international judicial fora, where its provisions have been invoked by U.S. claimants and judicially applied against the Islamic Republic, and where the other party to the present case, the United States, has throughout considered the Treaty as remaining in force, the Islamic Republic submits that it is reciprocally entitled to invoke its provisions where this is called for.

2.78 With respect to the second point, the fact that the Treaty was not specifically invoked in the

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[1] These Memoranda were published in the U.S. Congressional Record and are reprinted in XXII I.L.M. 1406 (1983) and XXIII I.L.M. 1182 (1984). Copies are attached at Exhibit 54.

[2] A copy of this document is also attached at Exhibit 54.

Application is no bar to it being raised here as an independent basis of jurisdiction. In support of this conclusion, the Islamic Republic refers to the Court's judgment in the jurisdictional phase of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)[1] where Nicaragua invoked for the first time in its Memorial a compromissory clause in its 1956 Treaty of Friendship, Commerce and Navigation (which was, for all intents and purposes, identical to Article XXI(2) of the Treaty of Amity) as a basis for the Court's jurisdiction.

2.79 Despite objection from the United States that the Treaty in question had not been raised in Nicaragua's Application, the Court held that -

> "... the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial[2]."

The Court observed that insofar as Article 38(2) of the Rules of Court only provides that the application shall specify the legal grounds upon which jurisdiction is based "as far as possible", additional grounds of jurisdiction may be brought to the Court's attention later provided that the applicant makes it clear that it intends to proceed on that basis and that the result is not to transform the dispute brought by the application into a different dispute[1]. This conclusion was reinforced by the fact that Nicaragua had reserved the right to amend its submissions in its application.

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[1] Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.

[2] Ibid., p. 426, para. 80.

2.80 In this case, the Islamic Republic also reserved the right in its Application "to supplement and amend" its submissions in the course of further proceedings[2]. By invoking the Treaty of Amity now, the Islamic Republic fully intends to proceed on the basis of its provisions as well as those cited in the Application regarding the Chicago and Montreal Conventions. Moreover, the character of the dispute will remain unchanged since the same underlying facts that give rise to the United States' liability under the Chicago and Montreal Conventions also engage the responsibility of the United States under the Treaty of Amity.

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 426-427, para. 80.

[2] See, Application, p. 8.

2.81 Moreover, as stated above, the dispute has been neither adjusted by diplomacy nor settled by other pacific means, hence entitling the Applicant to invoke the jurisdiction of the Court under Article XXI(2) of the Treaty. When the Islamic Republic filed its Application on 17 May 1989, its attempts to negotiate with the United States over the armed attack against its territorial sovereignty, the killing of civilians and the destruction of the aircraft and property had reached a deadlock, owing to the refusal of the United States Government to enter into any serious discussion of the matter. As the Court held in the United States Diplomatic and Consular Staff in Tehran case, "(i)n consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute ... not satisfactorily adjusted by diplomacy' within the meaning of Article XXI, paragraph 2, of the 1955 Treaty[1]". To quote again from this case, "the immediate and total refusal" of the United States authorities "to enter into any negotiations with" the Islamic Republic "excluded in limine any question of an agreement to have recourse to 'some other pacific means' for the settlement of the dispute[1]". The Court went on to note that while Article XXI(2) of the Treaty "does not provide in express terms that either party may bring a case to the Court by unilateral application, it was evident, as the United States contended in its Memorial, that this is what the parties intended[2]."

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[1] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 27, para. 51.

2.82 The Treaty of Amity provides for a broad range of rights and obligations of the Parties, a number of which are relevant to the present case. The Islamic Republic submits that in destroying IR 655, the United States violated the Preamble, Article IV(1) (calling for fair and equitable treatment to be afforded to the nationals and companies of each Party), Article VIII (providing for most favoured status for Iran and prohibiting the kind of trade embargo imposed by the United States which prevents the Islamic Republic from purchasing in particular new Airbus aircraft models due to their United States made components, and Article X(1) (which provides that

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[1] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 27, para. 52.

[2] Ibid.

"(b)etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation").

2.83 Here again, it is appropriate to recall what the Court said in the Military and Paramilitary Activities in and against Nicaragua case about a very similar point made by Nicaragua concerning its Treaty with the United States, since the Court's holding is directly on point with the jurisdictional issue raised here. The Court said:

> "Taking into account these Articles of the Treaty of 1956, particularly the provision in, inter alia, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty[1]."

2.84 This holding is directly apposite to the facts of this case. Given the United States' refusal to accept legal responsibility for its conduct in the face of the Islamic Republic's claims, and in the light of the

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 428, para. 83.

Islamic Republic's Application, a dispute over the interpretation and application of the specific provisions of the Treaty of Amity cited above clearly exists[1]. Since Article XXI(2) of the Treaty provides for the compulsory jurisdiction of the Court in such circumstances, the jurisdiction of the Court is firmly established here.

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[1] The Court's jurisprudence also makes it clear that it is irrelevant whether the Treaty of Amity was raised by the Islamic Republic in its statements on the IR 655 incident before the ICAO Council, the United Nations or elsewhere. As the Court indicated in the Military and Paramilitary Activities in and against Nicaragua case:

"In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty". (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 428, para. 83.

PART III

THE APPLICABLE PRINCIPLES AND RULES OF LAW

A. Introduction

3.01 In this Part, the Islamic Republic will present a statement of the principles and rules of international law under Article 38(1) of the Statute of the Court applicable to the question of legal responsibility for the destruction of IR 655 and the killing of the persons on board.

3.02 To the extent that the Islamic Republic invokes violations of conventional law in force between the Parties, it will be necessary to examine the specific provisions that have been breached. These include provisions of the Chicago Convention, the Montreal Convention, the Treaty of Amity and the United Nations Charter.

3.03 In addition, it will be necessary to examine a number of peremptory norms of customary international law, particularly relating to the use of armed force and respect for a State's territorial sovereignty, since these are reflected in the conventional rules and indeed throw light on their scope, and are necessary, in any event, for examining the interpretation and application of the Treaty of Amity. Contemporary international law, of which the special legal regime of international aviation law forms an integral part, establishes an absolute legal prohibition against the threat or use of force against the territorial integrity of any State. In the present case, the conduct of the United States will have to be assessed in the light of these principles and rules.

B. The Provisions of the Chicago Convention

3.04 The Chicago Convention provides a comprehensive set of rules which govern international civil aviation. Both the Islamic Republic and the United States, along with 160 other States, are parties to the Convention. It was ratified by the United States on 9 August 1946 and by Iran on 19 April 1950, and it continues to be in force with respect to both countries during the relevant period covered by this dispute. While the entire Convention is set out in Exhibit 1, its Preamble and Articles 1, 2, 3 *bis* and 44(a) and (h), and Annexes 2,11 and 15, are specifically referred to here since these are the provisions which the Islamic Republic maintains the United States more particularly has breached.

1. The Preamble

3.05 The Preamble to the Chicago Convention reads as follows:

> "WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and
>
> WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;
>
> THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;
>
> Have accordingly concluded this Convention to that end."

3.06 A number of basic legal obligations binding on the contracting Parties flow from these provisions. For example, it is clear that one of the principal purposes of the Chicago Convention as a whole is to promote the safe and orderly development of international civil aviation. The abuse of civil aviation is specifically recognized as being capable of becoming "a threat to the general security".

3.07 The shooting down of a civil aircraft registered in and flying over the territory of one State by the military forces of another is unquestionably contrary to the principle of the safe and orderly development of international civil aviation. On its face, such an action violates the whole purpose and intent of the Convention as expressed in its Preamble.

3.08 It would also be an understatement to describe the destruction of a civil aircraft by the use of weapons as an "abuse" of international civil aviation. As the Convention's Preamble makes clear, such abuses can become a threat to the general security. Thus, any State which acts in such a way as to abuse international civil aviation violates not only the express principles underlying the Chicago Convention, but general principles of security as well.

2. Articles 1 and 2

3.09 Article 1 of the Chicago Convention reads:

> "Sovereignty
>
> The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

And Article 2 provides:

> "Territory
>
> For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

3.10 Article 1 enshrines the basic rule of international law that every State has complete and exclusive sovereignty over the airspace above its territory. Article 2 elaborates on this by providing that "territory" includes the land areas (comprising, necessarily, any internal waters that may exist) and territorial waters adjacent thereto under the sovereignty, protection or mandate of such State. On the basis of these provisions, not only is a State's sovereignty over its airspace "complete" in the sense that there is no additional authority relating thereto which the State does not possess, it is also "exclusive". The Court had occasion to underscore this point in its judgment in the Military and Paramilitary Activities in and against Nicaragua case. There the Court said:

> "The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air

> space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law[1]."

3.11 From this it can be seen that "sovereignty" over airspace implies complete control and jurisdiction to the exclusion of other States. In the words of one commentator:

> "One aspect of this claim (of sovereignty) is the comprehensive and continuing, even arbitrary, exclusive competence to control access to and the use of, the airspace above their national territory[2]."

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[1] Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 111, para. 212. See, also, Hughes, op. cit., p. 595; and O. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law", 47 AJIL (1953), p. 559.

[2] Hughes, op. cit., pp. 595-596, citing M. McDougal, Law and Public Order in Space (1965), p. 254. See, also, the observation of Judge Huber in the Islands of Palmas case characterizing sovereignty as the "exclusive competence of the State in regard to its own territory" (Islands of Palmas Case (Netherlands v. United States), 2 R.I.A.A. 831 (1928), p. 838, cited in F. Hassan, "A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union", 49 Journal of Air Law and Commerce (1983), p. 562.

A corollary of this principle is that the State which exercises sovereignty over its airspace necessarily possesses the power to regulate the use of that airspace without interference from any other State.

3.12 While it is well established that civil aircraft operating from one State according to recognized international procedures in international airways and over high seas should be free from any undue interference from the military forces of another State, *a fortiori*, an aircraft operating within the airspace of its own country of registration cannot be subject to any outside interference. Such aircraft are answerable to the authorities of that country alone. It follows that it is a violation of Article 1 of the Chicago Convention and of the underlying principles of customary international law for any State to take action which interferes with the complete and exclusive sovereignty that another State enjoys over its own airspace. While interference can take many forms, certainly one of its most extreme expressions is when armed force is used to destroy a civil aircraft while it is flying within the airspace of its State of registration.

3. Article 3 bis

3.13 Article 3 bis of the Chicago Convention provides in sub-section (a) that:

> "(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."

3.14 This Article, also known as the 1984 Montreal Protocol to the Chicago Convention, was adopted by unanimous consent at an Extraordinary Session of the ICAO Assembly on 10 May 1984. Its wide-reaching acceptance was due primarily to the fact that some eight months earlier, KAL flight 007 had been shot down by Soviet forces after flying over Soviet airspace. The United States was the most vocal opponent of the Soviet Union's action, and it campaigned actively for the latter's condemnation as well as for the adoption of Article 3 bis. While Article 3 bis will only formally come into effect after two-thirds of ICAO's Member States have ratified it[1], it is important to appreciate that the obligations set forth in its subparagraph (a) reflect principles already well established in customary international law and, in fact, included within the pre-existing scope of the Chicago Convention. Thus, while Article 3 bis is useful in the sense that it clearly defines and codifies the prohibition against the use of armed force against civil aircraft, it does not add any new element to the principles that have underlain the Chicago Convention ever since its inception.

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[1] Thus far, some 56 States have ratified Article 3 bis. These do not include the Islamic Republic and the United States which, to this date, have not ratified the Montreal Protocol, but have both publicly bound themselves to respect its provisions.

3.15 From ICAO's own records, it is clear that in adopting Article 3 bis, the Assembly did not intend to create a new rule of law, but rather to give expression to a pre-existing one. This was underscored by the President of the ICAO Council, Dr. Assad Kotaite, in his remarks to the Assembly on the matter. Dr. Kotaite observed:

> "There may be some who believe that the prohibition of use of force against civil aircraft is already a firm part of general international law and that there is no need to codify that provision in the body of the Convention. True enough, the general international law is motivated by the principles of humanity, safety and protection of human life. Even in time of war, international law has explicit provisions for the protection of civilians in armed conflict, on the protection of the wounded and shipwrecked and on the protection of the prisoners of war. The International Court of Justice ruled, referring to customary international law, that these

> fundamentally humanitarian principles are more exacting in time of peace than they are in time of war. There is no doubt that these humanitarian principles concerning the protection of human life are deeply rooted in customary international law[1]."

3.16 The Director of ICAO's Legal Bureau also voiced the opinion that Article 3 bis is declaratory of existing customary international law. In his view, Article 3 bis recognized, as opposed to created, an obligation not to use weapons against civil aircraft[2]. This view has been confirmed by many others, including Judge Gilbert Guillaume in his article on the destruction of KAL flight 007. Judge Guillaume observed:

> "La règle ainsi explicitée ne constitue pas une nouvelle règle de droit ... La Communauté aéronautique internationale, en l'adoptant à l'unanimité, a en effet reconnu l'existence d'une règle préexistante s'imposant à tous et

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[1] ICAO A25-Min. P/1, cited in G. Richard, "KAL 007: The Legal Fallout", 9 ANN. Air & Space Law (1984), p. 153. Dr. Kotaite went on to point out, however, that it was still desirable to have the principle codified in a written law in order to remove any uncertainties.

[2] M. Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation", 11 ANN. Air & Space Law (1986), p. 113, p. 125.

> prohibant l'emploi des armes contre les aéronefs civils en vol[1]."

3.17 As has been seen, even before Article 3 *bis* was adopted, ICAO had not hesitated to condemn the use of force against civil aircraft as a fundamental violation of the Chicago Convention and international law. This was the case in both the 1973 Libyan Airlines and the 1983 KAL 007 incidents[2].

3.18 In the first case, Israel claimed that it had downed the plane because it was flying over a sensitive security area and because it had not responded to requests to land (a type of self-defence argument). This contention was flatly rejected. After commissioning a fact-finding investigation of the incident, the ICAO Council adopted its Resolution of 4 June 1973 (cited in paragraph 2.37 above) in which the Council held that Israel's action constituted "a flagrant violation of the principles enshrined in the Chicago Convention" and strongly condemned that action.

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[1] G. Guillaume, "La destruction, le 1^{er} septembre 1983, de l'avion des Korean Airlines (vol KE 007)", *Revue Française de Droit Aérien* (1984), p. 225.

Unoffical translation: "The rule thus set forth does not constitute a new rule of law ... The international aeronautical community, in unanimously adopting it, in effect recognized the existence of a pre-existing rule binding upon everybody and prohibiting the use of arms against civil aircraft in flight."

See, also, E. Sochor, who states: "With respect to air law, the amendment (Article 3 *bis*) to the Chicago Convention banning the use of armed force against a civilian aircraft did not break new ground because it only formally recognized a generally accepted principle in international law", *op*. *cit*., p. 162.

[2] For a review of these incidents, *see*, Hughes, *op*. *cit*., pp. 611-612; and J. Phelps, "Aerial Intrusions by Civil and Military Aircraft in Time of Peace", 107 *Military Law Review* (1985), pp. 288-290.

3.19 The Council's decision in the KAL 007 affair was equally unequivocal. Not only did it reaffirm that the Soviet Union's use of armed force constituted a violation of international law involving generally recognized legal consequences, it stated that such use of force was incompatible with norms governing international behaviour, elementary considerations of humanity and the provisions of the Chicago Convention including its Annexes.

3.20 The KAL precedent is particularly relevant in view of the uncompromising position that the United States took. To quote from the United States Alternative Representative during his intervention at the Extraordinary Session convened by the ICAO Council to address the matter:

> "The world must insist that the Soviet Union offer a formal apology, provide full and complete information regarding this incident, comply with its obligation under international

> law to make appropriate compensation, and give credible guarantees to refrain from similar action in the future[1]."

He added:

> "The world community has labelled this type of behaviour from private individuals and organizations as terrorist action. For an ICAO member State to take such action against airliners which stray into their airspace, and to assert their intent to do so again sets an ominous example and is fundamentally inimical to the aims and objectives of the Convention[2]."

3.21 The extent of the United States' outrage over the shooting down of a civilian aircraft was reflected in Resolution No. 353 passed jointly by the U.S. Senate and

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[1] C-Min. EXTRAORDINARY (1983)/1, p. 22. A copy of the relevant extracts from this document is attached at Exhibit 55.

[2] See, Exhibit 55, p. 23. Diplomatic notes that the United States sent to the Soviet Union categorizing the shooting down of KAL 007 as a breach of international law and demanding reparation are reprinted in XXII I.L.M. 1196-1198 (1983). Copies of these notes are attached at Exhibit 56. Interestingly, in the aftermath of this incident the United States and the Soviet Union signed an agreement providing for procedures for foreign airliners to make emergency landings in the restricted areas of the Soviet Union in the event of penetration of its airspace. See, E. Sochor, op. cit., p. 163; 25 I.L.M. 103 (1986). In contrast, the United States has taken no similar remedial action to assure that its warships in the Persian Gulf will not repeat this unlawful act of shooting down a civil airliner.

House of Representatives on 15 September 1983 and signed into law as Public Law 58-58 by President Reagan on 28 September 1983[1]. Amongst other things, the Resolution condemned the Soviet Union for destroying the aircraft and murdering those on board, and called for an apology and full compensation. The Resolution also criticized the Soviet Union for failing to undertake not to repeat similar actions and demanded that the Soviet Union "abide by internationally recognized and established procedures which are purposefully designed to prevent the occurrence of such tragedies".

3.22 Following these developments, the United States commenced its lobbying for the adoption of Article 3 bis into the Chicago Convention. To this end, the United States introduced a draft amendment to the Chicago Convention which, in relevant part, called for each contracting State not to use force against civil aviation and, when intercepting a civil aircraft, not to endanger the safety of the persons on board[2]. However, from the statements made by the U.S. Representatives at the time, and from the wording of Resolution 353, it was clear that the

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[1] A copy of the House-Senate Joint Resolution 353, dated 15 September 1983, is attached at Exhibit 57.

[2] A copy of this draft amendment is attached at Exhibit 55.

United States accepted that the destruction of a civilian aircraft by armed force violated the Chicago Convention even before Article 3 bis was introduced. Based on these statements, the United States would be estopped from now arguing that the use of armed force against a civil airliner is not a breach of the Chicago Convention.

4. Articles 44(a) and (h)

3.23 Articles 44(a) and 44(h) of the Chicago Convention provide as follows:

> "Objectives
>
> The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:
>
> (a) Insure the safe and orderly growth of international civil aviation throughout the world;
>
> * * *
>
> (h) Promote safety of flight in international air navigation; ... ."

3.24 These Articles reinforce the provisions of the Preamble regarding the importance of safety of flight as one of the principal objectives of the Chicago Convention. Thus, to the extent that it may be contended that the Preamble of an international agreement does not create binding legal obligations, in the case of the Chicago

Convention, these are provided for in Articles 44(a) and (h).

3.25 The central role of the principles set forth in Articles 44(a) and (h), and their close link to the prohibition against the use of armed force appearing in Article 3 bis, were underscored by the President of the ICAO Council in his opening remarks on the IR 655 incident at the Council's Extraordinary Session of 13 July 1988. The President observed:

> "In fact, the basic aim and purpose of our Organization as enshrined in the constitutional Charter of ICAO - the Convention on International Civil Aviation - is to agree on principles and to make arrangements in order that international civil aviation may be developed in a safe and orderly manner throughout the world. The fundamental principle that States must refrain from resorting to the use of weapons against civil aircraft must be respected by each State[1]."

3.26 While subparagraphs (a) and (h) of Article 44 lie at the very heart of the Chicago Convention, and thus form the predicate to every dispute that arises thereunder, it is significant to note that as recently as October 1985, Article 44(h) was specifically invoked before the Council by a State complaining about the unlawful violation of its airspace by foreign military forces. This complaint arose out of the attack and bombing on 1 October 1985 by Israeli warplanes on areas of Tunisian territory in the vicinity of the Tunis International Airport. In raising this incident before the ICAO Council, Tunisia not only asserted Israel's violation of the Preamble and Article 1 of the Chicago Convention, it also drew attention to the violation of the intent of Article 44(h). After deliberating Tunisia's requests, the Council adopted a Resolution condemning Israel for its violation and urging it to refrain from committing any further action which might endanger the safety of international civil aviation[1].

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[1] C-Min. EXTRAORDINARY (1988)/1, p. 3 (Exhibit 37).

3.27 It follows that there is clear precedent for invoking Article 44 of the Chicago Convention when an unlawful violation of a State's airspace has been committed which endangers the safety of international civil aviation. In the circumstances of this case, nothing could be further removed from insuring the safe and orderly growth of international civil aviation than the shooting down of an aircraft registered in one State by the armed forces of another State. Such conduct clearly violates Articles 44(a) and (h) of the Chicago Convention.

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[1] **Copies of this Resolution (Doc. C-Min. 116/11, pp. 84-86) together with Tunisia's complaint (Doc. C-Min 116/9, pp. 63-67) are attached at Exhibit 58.**

5. The Annexes to the Chicago Convention

3.28 The same purpose of air safety is reflected in the rationale established in Articles 37, 54(1) and 90 of the Chicago Convention whereby international standards and recommended practices adopted by the ICAO Council are designated as Annexes to the Convention. It is these Annexes which give substance to the general provisions in Articles 44(a) and (h).

3.29 In compliance with its mandate, ICAO has developed eighteen Annexes, three of which (Nos. 2, 11 and 15) are especially relevant in the present context. To preface a detailed analysis of the provisions of these Annexes, it is important to appreciate the quasi-legislative role of ICAO. Although each State has sovereignty over its own territorial airspace as provided for in Article 1 of the Chicago Convention, Article 12 establishes the following distinction:

> "Each contracting State undertakes to adopt measures to ensure that every aircraft flying over or maneuvering within its territory ... shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State

> undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention."

3.30 There are two levels of legislation within the Annexes, "Standards" and "Recommended Practices", which States should comply with. Article 38 of the Convention explains the distinction between the two, and provides that a State which "finds it impracticable to comply" with an international standard "or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard", shall give immediate notification to ICAO.

(a) Annex 2

3.31 The Rules of the Air established by ICAO appear in Annex 2 to the Chicago Convention. A note to paragraph 2.1.1. of Annex 2 states that -

> "(t)he Council of the International Civil Aviation Organization resolved, in adopting Annex 2 in April 1948 ... that the Annex constitutes Rules relating to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention. Over the high seas, therefore, these rules apply without exception".

3.32 According to the foreword to Annex 2, the entire text of the Annex is comprised of standards only, since all recommended practices were upgraded in 1951. By paragraph 2.1.2., contracting States are deemed to have agreed the following:

> "For purposes of flight over those parts of the high seas where a Contracting State has accepted, pursuant to a regional air navigation agreement, the responsibility of providing air traffic services, the 'appropriate ATS authority' referred to in this Annex is the relevant authority designated by the State responsible for providing those services[1]."

Therefore an Air Traffic Service ("ATS") provider in the airspace of State X will be accorded the responsibility through ICAO for co-ordinating an additional area of high seas airspace, the sovereign and international airspaces together constituting a Flight Information Region ("FIR"). The globe is largely divided into FIRs provided by States and the co-ordination and efficient operation of FIRs within a certain region, such as the Middle East, are periodically reviewed by means of Regional Air Navigation Conferences, in this case the Middle East Region Air Navigation Conference ("MID RAN"), under the auspices of ICAO, which adopts their reports. No other body, especially not the military forces of a third State, is granted any rights over civil aviation in an FIR[1].

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[1] Emphasis added.

3.33 Paragraph 3.3 of Annex 2 sets out the provisions regarding information on flights, in particular the content and filing of flight plans. Paragraph 3.3.1.1.2.1 states as follows:

> "A flight plan shall be submitted prior to operating:
>
> (a) any flight or portion thereof to be provided with air traffic control service ...
>
> (c) any flight within or into designated areas, or along designated routes, when so required by the appropriate ATS authority to facilitate the provision of flight information, alerting and search and rescue services;
>
> (d) any flight within or into designated areas, or along designated routes, when so required by the appropriate ATS authority to facilitate co-ordination with appropriate military units or with air traffic services units in adjacent States in order to avoid the possible need for interception for the purposes of identification;
>
> (e) any flight across international borders[2]."

3.34 In order to obviate the necessity for a potentially hazardous interception by State aircraft under the terms of paragraph 3.8 and appended material[1], ATS authorities need to be apprised of the flight plan information. This is so that an ATS authority may liaise, using the procedures to be discussed below in relation to Annex 11, with "appropriate military units" from its own State operating within its FIR. Liaison with "air traffic services units in adjacent States" is necessary in order to ensure an effective hand-over from one FIR to another of an aircraft in flight and thus to ensure the constant provision of ATS[2].

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[1] The area of Tehran FIR can be seen on page A-2 of ICAO Doc. C-WP/8645, a copy of which is attached at Exhibit 36.

[2] Emphasis added.

3.35 The flight plan must be submitted at least sixty minutes before departure of the aircraft "to an air traffic services reporting office" in accordance with sub-paragraphs 3.3.1.1.2.2 and 3 of Annex 2. On completion of a flight, a flight plan is closed by the aircraft commander making a report to the ATS unit at the arrival aerodrome pursuant to the provisions of paragraph 3.3.1.5. During the flight, according to paragraph 3.6.2.1, the aircraft -

> "shall adhere to the current flight plan ... submitted for a controlled flight (*i.e.*, one to

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[1] A "State aircraft" is defined in Article 3(b) of the Chicago Convention as an aircraft which is used in military, customs or police services.

[2] The military forces of a third State by definition would have no role in this level of co-ordination.

> which air traffic control services are provided) unless a request for a change has been made and clearance obtained from the appropriate air traffic control unit, or unless an emergency situation arises which necessitates immediate action by the aircraft, in which event as soon as circumstances permit, after such emergency authority is exercised, the appropriate air traffic services unit shall be notified of the action taken and that this action has been taken under emergency authority."

3.36 From these provisions, it is clear that the relevant ATS provider is the only legitimate body which can authorise a deviation from a filed flight plan. This is subject only to the final authority of the aircraft commander to deviate where this is required in an emergency to ensure the safety of his aircraft under national regulations of the State of registration of his aircraft or pursuant to universally applicable principles of good airmanship. Again, it is obvious that the military forces of a third State have no right to order a deviation from a filed flight plan.

3.37 The only situation which may involve a deviation from an agreed flight plan is an interception by a State aircraft. Where an aircraft is still flying true to its flight plan there should be no need for State aircraft to become involved at all. Therefore, interception presupposes a prior deviation due, for example, to a navigational error. Where an aircraft has deviated and thereby penetrates another State's airspace without authorization (usually coupled with proximity to a prohibited or restricted area), then the interception procedures set out in Appendix B to Annex 2 come into play. The latter are expressed to be standards by paragraph 3.8.2 of the Annex. Paragraph 1.1 of Appendix B states the following important principles:

> "To achieve the uniformity in regulations which is necessary for the safety of navigation of civil aircraft due regard shall be had by Contracting States to the following principles when developing (municipal) regulations and administrative directives:
>
> (a) interception of civil aircraft will be undertaken only as a last resort;
>
> (b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome ...[1]."

3.38 In addition, Attachment A, which has special recommendatory status, sets out the minimum and maximum standards for intercepting State aircraft and intercepted civil aircraft. Three phases of interception manoeuvres are specified, which the intercepting aircraft may adopt in order to properly and safely identify the intercepted aircraft. Visual and audio signals are specified in the Attachment and in the more substantive part of the Annex in order that interceptor and interceptee may understand each other and to avoid any potentially dangerous opportunities for misinterpretation.

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[1] Emphasis added.

3.39 It is submitted that these establish the upper limits of interference by State authorities with civil aircraft permitted under international law. A State may go no further in its own airspace even if an aircraft is intruding. There is no right of interception whatsoever in the Chicago Convention allowing a third State to interfere in any way with civil aircraft in the FIR under the control of another State, especially if the aircraft is not intruding but is within the airspace and FIR of its own State of registration.

(b) Annex 11

3.40 Annex 11 deals with Air Traffic Services. The key provisions in the present context are those concerning co-ordination between military authorities and civilian ATS authorities. In this respect, paragraph 2.14 provides as follows:

> "2.14.1 Air traffic services authorities shall establish and maintain close co-operation with military authorities responsible for activities

> that may affect flights of civil aircraft.
> 2.14.2 Co-ordination of activities potentially hazardous to civil aircraft shall be effected in accordance with 2.15."

Paragraph 2.15 states the following:

> "The arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be co-ordinated with the appropriate air traffic services authorities. The co-ordination shall be effected early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15."

3.41 Guidance regarding the interpretation of the above provisions is contained in the Air Traffic Services Planning Manual[1] (the "Manual"). As mentioned above, a State may establish prohibited or restricted areas over its own territory. However, according to paragraph 3.3.2.2 of the Manual -

> "(i)n areas where no sovereign rights are exercised (e.g. over the high seas) only danger areas may be established by that body responsible for the activities causing their establishment."

3.42 A danger area is defined in Annex 15 as "(a)n airspace of defined dimensions within which activities dangerous to the flight of aircraft may exist at specified times". Paragraph 3.3.2.4 of the Manual provides a limitation on the establishment of a danger area over the high seas which, it is submitted, is the upper limit of the authority which the United States could have arguably exercised in the high seas portion of the Persian Gulf. It states:

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[1] ICAO Doc. 9426-AN/924 1984 (emphasis in original).

> "Over the high seas, regardless of the risk involved, only danger areas can be established. Those who initiate danger area restrictions over the high seas are under an increased moral obligation to judge whether establishment of the danger area is unavoidable and if it is, to give full details on the intended activities therein. It would appear that activities exceeding a certain risk level should not be conducted in such airspace and that other methods of achieving the desired objective, such as temporary airspace reservations, should be applied." (emphasis added)

3.43 The Manual also deals with temporary airspace reservations, which is the only other authorized means of affecting airspace in the circumstances of this case within the context of a NOTAM, itself to be discussed separately below. The Manual states in paragraph 3.3.3.1 that -

> "(i)t is generally accepted practice that airspace reservations should only be applied during limited periods of time and should be abolished as soon as the activity having caused their establishment ceases ....(A)irspace reservations should be co-ordinated primarily

> with the ATS units directly concerned because they will be in the best position to propose and develop the procedural means required to put the reservation into effect."

3.44 Further guidance on proper civil-military co-ordination is premised upon the basic principle expressed in paragraph 2.2.3 of the Manual that -

> "(t)he resultant sharing of the airspace must therefore be made in such a manner that military operations do not constitute a hazard to the safe conduct of civil flights."

3.45 It is apparent, therefore, that the obligation placed upon States to co-ordinate their potentially hazardous activities with ATS authorities in paragraph 2.15 of Annex 11 is pre-eminent over that which is placed upon ATS authorities to co-operate with military authorities under paragraph 2.14. The latter duty envisages co-ordination by the ATS provider with the military authorities in its own area of competence.

3.46 During the Third MID RAN meeting held between 27 March and 13 April 1984[1] ("the MID RAN Meeting"), the issue of civil-military co-ordination was addressed. The MID RAN Meeting recalled ICAO Assembly Resolution A26-8 which, inter alia, resolved as follows:

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[1] ICAO Doc. 9434. MID/3. A copy of extracts from this document is attached at Exhibit 59.

> "1. the common use by civil and military aviation of airspace and of services shall be arranged so as to ensure the safety, regularity and efficiency of international civil air traffic; and
>
> 2. the regulations and procedures established by Contracting States to govern the operation of their State aircraft over the high seas shall ensure that these operations do not compromise the safety, regularity and efficiency of international civil air traffic and that, to the extent practicable, these operations comply with the rules of the air in Annex 2."

The MID RAN Meeting noted that -

> "the Middle East region was generally one of the most congested, restrictive and difficult areas in which to operate, due to the large number of prohibited, restricted and danger areas, which led to circuitous routings in many cases, and a number of flight level restrictions on the airways[1]."

3.47 In compliance with its mandate, the MID RAN Meeting promulgated Recommendation 2.6/1[2]. The

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[1] Para. 2.6.2 of the Minutes.

[2] See, pp. 2.6-3, et seq., of Exhibit 59.

Recommendation provided for a series of detailed and explicit co-ordination measures to be taken by MID RAN States in order to ensure that civil aircraft could navigate safely in the region, unmolested by military activities. The measures had been fully implemented by the Islamic Republic and other littoral States of the Persian Gulf as noted in the Minutes of the Meeting of 6 October 1988 held at the Paris office of ICAO which appear as Exhibit 40 hereto.

3.48 Before the United States' interference in civil aviation in the region, that is prior to the 1984 NOTAMs, and the destruction of IR 655, therefore, there was a pre-existing regulatory regime governing territorial and high seas airspace for the whole Middle East, including the Persian Gulf. Any State entering this area and proposing to conduct military activities which might impinge upon civil aviation was under a duty to actively seek out the lawful authorities in order that they could effect proper civil-military co-ordination within their own FIR to ensure the safety of civil aviation. The United States totally ignored these safety regulations of the Chicago Convention.

(c) Annex 15

3.49 This Annex deals with Aeronautical Information Services. In the present context, the provisions concerning the issuance of NOTAMs are particularly relevant. A NOTAM is defined in Chapter 2 of Annex 15 in the following terms:

> "A notice containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations.
>
> - Class I Distribution. Distribution by means of telecommunication.
>
> - Class II Distribution. Distribution by means other than telecommunication (i.e. by mail)."

3.50 Chapter 3 of Annex 15 sets out the responsibilities and functions of each Contracting State regarding the provision of aeronautical information services in general, including NOTAMs. Paragraph 3.2.1 of the Annex states that-

> "(e)ach Contracting State shall take all reasonable measures to ensure that the information it provides relating to its own territory is adequate, accurate and timely. This shall include arrangements for the timely provision of required information to the aeronautical information services by each of the State services associated with aircraft operations." (emphasis added)

Paragraph 3.2.4.1 then provides that-

> "(m)aterial to be issued by NOTAM shall be thoroughly checked and co-ordinated by the responsible services before it is submitted to the aeronautical information service, in order to make certain that all necessary information has been included and that it is correct in detail prior to distribution."

3.51 The requisite contents of a NOTAM are specified in Chapter 5 of the Annex. A NOTAM is envisaged to be of "a temporary nature" by paragraph 5.1.1, while paragraph 5.1.1.1 states that a NOTAM "shall be originated and issued" whenever a number of specified circumstances are envisaged. The two most relevant in the present context are as follows:

> "l) presence of hazards which affect air navigation (including obstacles (and) military exercises) ...;
>
> m) establishment or discontinuance (including activation or de-activation) as applicable, or changes in the status of prohibited, restricted or danger areas ...."

3.52 At most, Annex 15 may permit a State to issue a NOTAM concerning high seas airspace within its own FIR in which a "danger area" exists for a temporary period. It will be recalled that such a "danger area" must be of "defined dimensions". A lesser degree of interference by a State with high seas overflight is possible by means of an "airspace reservation" of very limited duration. However, international air law does not permit any issue of a

NOTAM by one State which impinges or may impinge upon another State's airspace or which is unlimited in duration like that of the United States. This was also confirmed by the 23 April 1985 decision of the ICAO Council concerning the illegality of Iraqi NOTAMs over Iranian airspace. It was in the light of these provisions that the 6 October 1988 meeting at the Paris office of ICAO concluded that the United States' NOTAM with respect to the Persian Gulf -

> "...is in contravention of approved ICAO Standards and Recommended Practices. The meeting disagreed with this practice by the United States. It stressed that the promulgation of aeronautical information is the responsibility of the appropriate ATS authority of the States which provide services in the FIRs concerned, including the airspace extending over the high seas, in accordance with relevant ICAO provisions and the Air Navigation Plan of ICAO. In the light of these circumstances, the meeting requests the Council of ICAO to urgently address this matter, and to take appropriate measures to secure the withdrawal of the referenced NOTAM[1]."

This MID RAN Report was also confirmed by the ICAO Council.

C. The Provisions of the Montreal Convention

3.53 The Montreal Convention of 1971, following after the Tokyo Convention of 1963 and the Hague Convention of 1970, was the third in a series of multilateral treaties developed under the aegis of ICAO and designed to deal with the suppression of unlawful acts against the safety of civil aviation and its passengers, crew and aircraft. To this end, Article 1 provides in sub-paragraphs (a) and (b) that:

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[1] See, Exhibit 40, p. 2.

> "1. Any person commits an offence if he unlawfully and intentionally:
>
> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight."

3.54 The legal prohibition established under Article 1 is categorical and unqualified. According to ordinary rules of treaty construction, including the provisions of Article 31(1) of the Vienna Convention on the Law of Treaties, this legal prohibition is not simply limited to hijackings or terrorism, but includes all acts of violence against the aircraft and persons on board likely to endanger the aircraft's safety as well as the destruction of an aircraft[1].

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[1] It is worth recalling that in relation to the shooting down of KAL 007, the Representative of the United States termed such action "terrorist action" (see, para. 3.20, above).

3.55 By the same token, the reference to "any person" in Article 1 must be read to include both natural persons and "persons" such as foreign governments or armed forces. As confirmed by the 1988 Rome Conference of the International Maritime Organization on adoption of the Convention on Maritime Safety, Article 3, paragraph 1 of that Convention, containing a similar provision for supression of unlawful acts against the safety of maritime navigation by "any person", covers "persons" such as foreign governments and members of their armed forces[1]. It was also acknowledged in the proceedings of the International Law Association at its 1984 Biennial Reunion, when the concept of "State terrorism" was debated, that the kind of acts which are prohibited by the Montreal Convention are performed by people; and even government officials might become liable by virtue of authorizing or ratifying such acts[2].

3.56 This conclusion draws support from the law of State responsibility for the acts of a State's agents and officials. In the Massey claim, for example, Commissioner Nielson stated the rule in the following way:

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[1] IMO Doc. PCUA 2/pp. 13 and 14 (1988).

[2] See, International Law Association (Report, Paris Revision), Committee on International Terrorism (1984), pp. 167-169. See, also, A. Sofaer, "Terrorism and the Law", 64 Foreign Affairs (1986), p. 920; McWhinney, Aerial Piracy and International Terrorism (2nd rev. ed., 1987), pp. 153-155; and Sucharitkul "International Terrorism and the Problem of Jurisdiction", 14 Syracuse Journal of Int'l Law and Commerce (1988), p. 1.

> "I believe that it is undoubtedly a sound general principle that whenever misconduct on the part of (persons in State service), whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants[1]."

3.57 An even more stringent set of principles applies to the armed forces of a State. Thus, in the Youmans case, the United States-Mexico General Claims Commission rejected an argument advanced by the Mexican Government that the wrongful act of a military official acting in the discharge of his duties could not engage the responsibility of the State under international law. The Commission held:

> "If this were the ... rule it would follow that no wrongful acts committed by an official could

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[1] Massey v. United Mexican States, 4 R.I.A.A 155 (1927), at p. 159, cited in Repertory of International Arbitral Jurisprudence, Vol. II (ed. Coussirat-Coustère and Eisemann, 1989), p. 489; and see, generally, J-P. Queneudec, La Responsabilité Internationale de l'Etat pour les Fautes Personnelles de ses Agents (Paris, 1966), pp. 173-193; I. Brownlie, System of the Law of Nations: State Responsibility (Oxford, 1983), pp. 139-141; and D.P. O'Connell, International Law (London, 2nd ed. 1970), p. 963.

> be considered as acts for which his Government could be held liable ... we do not consider that the participation of the soldiers in the murder ... can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer[1]."

Similar reasoning underlies part of the Court's holding in the Nicaragua case. For example, the United States was held liable for a breach of international law by training, arming, equiping and financing the Contra forces whose acts were, in this respect, imputable to the United States[2].

3.58 In the light of these principles, therefore, it can be seen that any "person" who commits a violation of the Montreal Convention within the meaning of Article 1 thereof necessarily includes a State when the "person" involved is one of the State's agents or officials for whose acts the State is responsible. In other words, a

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[1] Youmans v. United Mexican States, 4 R.I.A.A. 110 (1926), pp. 115-116, cited in Repertory of International Arbitral Jurisprudence, Vol. II, op. cit., pp. 498-499. See, also, A. Freeman, Responsibility of States for Unlawful Acts of their Armed Forces (A.W. Sijthoff, Leyden, 1957), pp. 49-52.

[2] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 196, para. 292(3) (dispositif).

State acts through its representatives and agents who are natural persons. In this case, the crew of the Vincennes, its Commanding Officer, Captain Will Rogers, and his superiors were acting directly under the authority of the United States[1].

3.59 Moreover, the shooting down of IR 655 was an intentional act for which the United States bears responsibility within the meaning of Article 1 of the Montreal Convention. Evidence of the United States "intent" is provided by the record of actions on board the Vincennes before it fired and the fact that permission to fire was sought from the United States Middle East Task Force.

3.60 Article 3 of the Montreal Convention is also relevant. This Article links the State to the offence committed by a "person" under Article 1 using the following language:

> '"Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties."

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[1] Moreover, the United States effectively ratified the action of Captain Rogers when it subsequently awarded him the Legion of Merit for his service in the Persian Gulf. See, The Washington Post, 23 April 1990, a copy of an extract of which is attached at Exhibit 64.

As will be shown, the United States violated this provision as well. Rather than punishing Captain Will Rogers for the commission of this international crime, the United States bestowed on him one of its highest peace-time honours for his service in the Persian Gulf.

3.61 Finally, Article 10(1) must also be noted. It provides:

> "1. Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1."

The actions of the United States were directly contrary to this provision. The circumstances and events set out in Part I reveal not only that the United States has continued to interfere with civil aviation in the Region but also that the United States has failed to take appropriate measures to prevent the recurrence of offences under Article 1, which, in this case, involved the killing of 290 innocent people on board an aircraft and the destruction of the aircraft itself. The United States must bear responsibility for these violations as well.

D. The Treaty of Amity

3.62 The relevant provisions of the Treaty of Amity have been referred to above in connection with the discussion of the Court's jurisdiction. Apart from the Preamble, the relevant substantive provisions are Articles IV(1), VIII (1) and (2) and X(1) which, for convenience, are set out below:

> "Article IV
>
> 1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement in conformity with the applicable laws."
>
> "Article VIII
>
> 1. Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to: (a) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (b) internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports.

> 2. Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited."
>
> "Article X
>
> 1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

3.63 It is not necessary to interpret these provisions as a matter of first impression: the Court has already had occasion to address virtually identical treaty provisions in the Military and Paramilitary Activities in and against Nicaragua case. That case also involved a treaty of Friendship, Commerce and Navigation (customarily called a "FCN" Treaty) similar to the Treaty of Amity with Iran[1]. Its Article I contained a provision very much along the lines of Article IV of the Treaty of Amity with Iran, and its Article XIX included a provision calling for freedom of commerce and navigation similar to Article X(1) of the Treaty of Amity with Iran.

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[1] The U.S. Deputy Assistant Secretary of State at the time the Nicaragua-U.S. and Iran-U.S. treaties were signed referred to each as "the traditional type" of FCN treaty. Hearing before the U.S. Senate, Committee on Foreign Relations, (84th Cong., 2nd Sess.), 3 July 1956, pp. 1-2.

3.64 The Court's judgment in the Nicaragua case sheds light on the scope of the legal obligation imposed on each Party by their general undertaking that there be peace and friendship between them. The Court stated:

> "There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. The object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense[1]."

3.65 Here, the specific fields provided for in the Treaty of Amity which the Islamic Republic maintains have been violated by the United States in shooting down IR 655 are (i) the failure under Article IV(1) to accord "fair and equitable treatment" to the nationals of the Islamic Republic who were killed as a result of the United States' actions, (ii) the failure under Article VIII to afford unrestricted trade, in particular concerning the Islamic Republic's ability to purchase a replacement aircraft, and (iii) the failure to respect the Islamic Republic's freedom of commerce and navigation provided for in Article X(1).

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 137, para. 273.

3.66 With respect to the first point, the obligation of the United States to accord fair and equitable treatment to nationals and companies of the Islamic Republic under Article IV(1) of the Treaty of Amity necessarily includes the obligation not to interfere repeatedly with Iranian commercial aircraft and above all not to kill Iranians or to destroy property belonging to an Iranian company - in this case an Airbus 300 belonging to Iran Air. With respect to the second point, the Court in the Nicaragua case has already held that the imposition of a general trade embargo violates the terms of a similar treaty provision calling for freedom of commerce[1]. And as for the third point, the use of force by one of the Contracting Parties to destroy a civil aircraft engaged in an international commercial flight and navigating within the assigned air corridor over the territory of the other Contracting Party by definition brings into play the whole question of freedom of commerce and navigation guaranteed under Article X(1) of the Treaty of Amity.

3.67 In this context it is again appropriate to refer to the Nicaragua case because Nicaragua also claimed that the United States had violated similar treaty provisions calling for freedom of commerce and navigation. Specifically, Nicaragua alleged that its ports had been mined in contravention of Article XIX of the 1956 FCN Treaty which, in its sub-paragraph 1, provided that "(b)etween the territories of the two Parties there shall be freedom of commerce and navigation". The Court agreed. It held:

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 148, para. 292(11) (dispositif).

> "For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty ... In the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce[1]."

This conclusion was repeated in paragraph 7 of the Court's dispositif where the Court decided by fourteen votes to one that -

> "... by the acts referred to in subparagraph (6) hereof (the laying of mines in Nicaragua's internal or territorial waters), the United States of America has acted, against the Republic of Nicaragua, in breach of its

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 139, para. 278.

obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation ...[1]".

3.68 Given that the laying of mines by one State in the internal and territorial waters of another State, leading to the loss of lives and the destruction of property, constitutes a violation of the obligation to guarantee freedom of commerce and navigation, the question arises in the context of this case whether repeated interferences with civil and commercial aircraft by one State's military forces, resulting in the destruction of a commercial airliner over the internal and territorial waters of the other State, is any less of a violation of Articles IV(1) and X(1) of the Treaty of Amity. The answer, it is submitted, is clear: such an act constitutes a fundamental breach of the Treaty.

E. The United Nations Charter

3.69 It has been shown above that principles of customary international law underlie several of the provisions appearing in the Chicago Convention, especially those relating to a State's sovereignty over its airspace (Article 1) and the prohibition against the use of weapons against civil aircraft in flight (Article 3 bis). Similarly, the question whether the United States has breached Articles IV(1) and X(1) of the Treaty of Amity also gives rise to issues under customary international law and the United Nations Charter relating to the duty of States to respect the sovereignty and rights of another State within the latter's own internal waters and territorial sea. Each of these topics will be discussed below.

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 147 (dispositif).

1. The Prohibition against the Use of Armed Force

3.70 The principle appearing in Article 3 bis (a) of the Chicago Convention has a direct connection to the general and overriding prohibition under international law against the threat or use of force. This prohibition appears in Article 2(4) of the United Nations Charter, which is appropriately mentioned here inasmuch as the second sentence of Article 3 bis (a) expressly states that the obligations set out in its first sentence "shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations[1]".

3.71 Just as the provisions of Article 3 *bis* (a) of the Chicago Convention are expressive of principles of customary international law, so also is the prohibition against the threat or use of force found in Article 2(4) of the Charter well established in customary international law. In its Judgment in the *Military and Paramilitary Activities in and against Nicaragua* case, the Court confirmed this point. Noting that the principle articulated in Article 2(4) "may ... be regarded as a principle of customary international law", the Court added that this Article is frequently referred to as being "not only a principle of customary international law *but also a fundamental or cardinal principle of such law*[2]". As such, there can be no doubt that the prohibition against the threat or use of force is part of the contemporary jus cogens.

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[1] Article 2(4) provides:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations."

[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, paras. 188 and 190 (emphasis added). The United States itself has emphasized the customary and general law nature of Article 2(4); *ibid*., p. 99, para. 187.

3.72 The same conclusions flow from an examination of the 1974 General Assembly Resolution 3314 (XXIX) concerning the Definition of Aggression and the 1970 Resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Under the former, aggression is defined in Article I as -

> "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition."

With respect to the latter, and particularly the prohibition against the threat or use of force, the Court has made it clear that this Declaration provides an indication of the opinio juris of States on the question[1].

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 101, para. 191.

3.73 It will be recalled that in his observations on the customary international law nature of Article 3 bis of the Chicago Convention, Dr. Kotaite referred to "fundamentally humanitarian principles" more exacting in times of peace than in times of war. This statement had its roots in the Court's judgment in the Corfu Channel case[1]. There the Court held, in commenting on the obligations incumbent upon the Albanian authorities to notify shipping of the presence of a minefield in its territorial waters, that-

> "Such obligations are based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ...[2]."

3.74 The significance of this holding is not simply that international law, including the Chicago Convention, prohibits the use of force against civil aircraft but also that it condemns actions by States which, in the words of the United Kingdom's Memorial in the Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria) case, "in time of peace unnecessarily or recklessly involve risk to the lives of the nationals of other States or destruction of their property[1]".

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[1] Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4.

[2] Ibid., p. 22.

3.75 Similar reasoning may be found in the case of Garcia v. United States, a case which was cited by both the United States and Britain in their pleadings before the Court in the 1955 Aerial Incident case[2]. In Garcia, an American officer fired on a raft which had crossed the Rio Grande river from the Mexican to the American side. Although the officer maintained that he had fired at a distance without intending to hit anybody, a child aboard the raft was killed. The Mexico-United States Claims Commission decided that the action in shooting was illegal despite the fact that there was no intention of killing anyone and even if the officer's judgment was in error[3].

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[1] I.C.J. Pleadings, Aerial Incident of 27 July 1955, Memorial of the United Kingdom, p. 350, para. 67. As Professor Alwyn Freeman has noted, States have a duty of "due diligence" in their conduct. This "is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances". A. Freeman, op. cit., pp. 15-16.

[2] United Mexican States v. United States of America, 4 R.I.A.A. 119 (1928).

[3] Cited by Hughes, op. cit., at p. 606; and see, Coussirat-Coustère and Eisemann, op. cit., at p. 507.

3.76 It follows from these precedents that a State, over and above its obligation not to use force against a civil aircraft, is also under a duty not to act in such a manner as to place civil aviation unnecessarily or unreasonably in danger. As the Court's judgment in the Corfu Channel case makes clear, the force of such a principle is even more exacting in time of peace - i.e., when there is little likelihood that any resort to the use of force is either necessary or legitimate.

3.77 One of the central purposes of the Chicago Convention - the development of civil aviation in a safe and orderly way - is as much violated by conduct which recklessly poses a danger to civil aircraft in flight as it is by the actual use of force against such aircraft. As will be seen in the next Part, the act of the United States in placing a guided missile cruiser with a highly sophisticated weapons system directly underneath an international air corridor and threatening to shoot was unlawful in itself, and constituted one of the main factors which caused the subsequent illegal destruction of IR 655.

2. Rules Relating to a State's Territorial Sovereignty

3.78 From the factual discussion in Part I, it is evident that the USS Vincennes together with the Sides and the Montgomery were within the Islamic Republic's territorial waters when the Vincennes fired on IR 655, and that the wreckage from the flight fell in the Islamic Republic's internal waters. In addition, the Vincennes' helicopter had penetrated the Islamic Republic's internal waters when it was sent to harass coastal patrols earlier on the morning of 3 July 1988. These facts bring into play the legal rules relating to territorial sovereignty and non-intervention as well as those pertaining to the Law of the Sea, which also underlie several of the conventional standards. To reiterate what the Court has said on this point:

> "The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention[1]."

3.79 The basic legal concept of State sovereignty in international law is expressed in Article 2(1) of the United Nations Charter. As the Court has noted, this sovereignty "extends to the internal waters and territorial sea of every State and to the air space above its territory" both under customary law and under the provisions of the Chicago Convention referred to above[1].

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 128, para. 251.

3.80 As for non-intervention, the Court in the Nicaragua case articulated the following rule:

> "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law[2]."

The Court then drew attention to its decision in the Corfu Channel case where it held:

> "Between independent States, respect for territorial sovereignty is an essential foundation of international relations[3]."

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 111, para. 212. As the former U.S. Agent in this case has observed, "In general, a nation may not enter upon another's territory without its consent." A. Sofaer, op. cit., p. 919 (emphasis is original).

[2] Ibid., p. 106, para. 202.

[3] Ibid., citing Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 35. See, also, generally, Aleksidse, "Problema Jus Cogens v. Sovremennom Mezhdunarodnom Prave", Sovetskii Ezhegodnik Mezhdunarodnogo Prava (1969), 127; and Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", Recueil des Cours, Vol. 1 (1925).

3.81 In the context of the present case, the Court is faced with a situation where the action complained of - namely, the destruction of IR 655 - took place over the Islamic Republic's internal waters and territorial sea as a result of aggressive actions by U.S. warships that were themselves operating within that territorial sea. In view of the fact that under international law the Islamic Republic's sovereignty extends to these areas, the question arises as to whether the U.S. warships' conduct in this regard violated the principle of non-intervention, in addition to the prohibition against the use of force.

3.82 Under customary international law, ships of all States enjoy the right of innocent passage through the territorial sea of another State. This right was reflected in Article 14 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and has been incorporated in the 1982 United Nations Convention on the Law of the Sea in Article 17[1].

3.83 The right of innocent passage, however, is not unfettered. Pursuant to Article 18(2) of the Law of the

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[1] Pursuant to Article 310 of the United Nations Convention on the Law of the Sea, the Islamic Republic made a statement at the time of signature setting forth its understanding with respect to certain provisions of the Convention. A copy of this statement is attached at Exhibit 60.

Sea Convention, for example, passage "shall be continuous and expeditious". More importantly, passage must be "innocent" which, according to Article 19(1) of the Convention, is the case "so long as it is not prejudicial to the peace, good order or security of the coastal State[1]". In this respect, Articles 19(2) (a) and (b) provide that passage shall be considered to be prejudicial when a ship engages in -

> "(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; and
>
> "(b) any exercise or practice with weapons of any kind."

These principles were also violated in attacking the Iranian patrol boats and in shooting down IR 655.

3.84 The same principle set forth in subparagraph (a) of Article 19(2) of the U.N. Law of the Sea Convention also appears in its Article 301. That Article states:

> "In exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force

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[1] See, also, Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, pp. 30-35.

> against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."

3.85 It follows from these provisions, which represent crystallized rules of customary international law, that the use of force and the exercise of weapons by a naval vessel within the territorial sea or internal waters of another State is inconsistent with the right of innocent passage and violates the coastal State's sovereignty and territorial integrity. In the Nicaragua case, the Court held that the laying of mines by one State within the territorial sea or internal waters of another State violates international law in this respect. In the Corfu Channel case, the Court held that the unauthorized minesweeping by one State of areas within another State's territorial sea is also illegal. Based on these precedents, it surely follows that it is no less a violation of international law for a foreign warship to manoeuvre into the territorial sea of another State and shoot down a civilian airliner operating in that State's airspace above its own territorial sea.

3.86 Such actions also violated Iranian law, governing the right of passage and stopover of foreign warships in Iranian territorial waters. Articles 4 to 8 of the 1934 Act on the Territorial Waters and the Contiguous

Zone of Iran and the Executive Regulations issued pursuant thereto on 29 August 1934 regulate the passage and stopover of foreign warships in Iranian waters[1]. Article 2 of the Executive Regulation on Conditions for Passage and Stopover of Foreign Warships in Iranian Waters and Ports provides that foreign warships must obtain the authorization of the Iranian Government eight days in advance of the warship's entry into Iranian waters and that at no time may there be more than two such warships in the territorial waters. It is clear that the U.S. warships involved in this dispute had entered into Iranian waters without such authorization from the Iranian authorities and that in any event they were more than two warships within the territorial waters on the date of the incident, thus violating both Iranian law and customary international law.

3.87 The regulations relating to the innocent passage of warships set out in the 1934 Act and Executive Regulation, which were adopted for the preservation of the security interests of Iran, are also in conformity with customary international law and Article 19 of the Law of the Sea Convention of 1982. A coastal State's right to adopt laws and regulations governing innocent passage was expressly recognized in the negotiations leading to the 1982

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[1] See, Exhibit 5.

Convention. In considering a 30-nation amendment to include the factor of coastal State security in a listing of matters on which coastal States may adopt laws and regulations to govern the innocent passage of vessels through their territorial sea (Document A/CONF 62/L. 117), Mr. Tommy T.B. Koh, the President of the Law of the Sea Conference, on 26 April 1982 read out a statement-

> "... to the effect that, although the sponsors of the amendment had proposed it with a view to clarifying the text of the convention, in response to the President's appeal they had agreed not to press for a vote, 'without prejudice to the right of coastal States to safeguard their security interests in accordance with articles 19 and 35 of the convention'[1]."

3. The Exercise of Self-Defence

3.88 The United States has put forward a number of suggestions that its action in shooting down IR 655 was justified as a matter of self-defence. In his speech before the U.N. Security Council, for example, the then Vice-President, George Bush, stated: "One thing is clear: The *USS Vincennes* acted in self-defense[2]". This view was repeated by the former Legal Adviser of the U.S. Department of State and the former U.S. Agent in this case, Abraham Sofaer, in his testimony before the House of Representatives. Mr. Sofaer claimed that when the *Vincennes* fired, it was "exercising justifiable defensive action[1]".

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[1] 16 *Official Documents of the United Nations Law of the Sea Conference* 142 (1982).

[2] *See*, the Address of Vice-President Bush before the Security Council, *reprinted in* *The Persian Gulf Conflict and Iran Air 655*, Dept. of State, Bureau of Public Affairs, Current Policy Publication No. 1093 (*Exhibit 11*).

3.89 In the light of these statements, it is appropriate to examine briefly the doctrine of self-defence, even though it is for the United States to formulate and prove such a defence. Here, the starting point must be Article 51 of the United Nations Charter[2]. Article 51 reads:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

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[1] *House Hearings*, p. 48 (*Exhibit 10*).

[2] *See*, in this respect, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94, para. 176.

3.90 Several aspects of Article 51 and of the right of self-defence generally warrant comment. First, the use of force in self-defence is an exception to the basic rule that the threat or use of force is _prima facie_ illegal. This conclusion has been recognized by the Court in the _Nicaragua_ case where the Court indicated that the -

> "... normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful[1]."

3.91 In other words, the basic rule of international law with respect to any use of armed force is that the action is illegal and that self-defence can only be invoked as an exception, or defence, to the normal application of the rule. A State invoking self-defence to justify otherwise illegal conduct bears a very rigorous burden of proof to demonstrate that, in the circumstances, its actions were a legitimate exercise of self-defence. This is all the more true in the light of the fact that under Chapter VII of the United Nations Charter, the Security Council has the exclusive responsibility for deciding what measures should be taken in response to any threat to peace.

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[1] _Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986_, p. 45, para. 74.

3.92 The second aspect of Article 51 which must be noted is that the right of self-defence may only be exercised "if an armed attack occurs against a Member". In the Nicaragua case, the Court put it this way:

> "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack[1]."

3.93 In the present case, it will be necessary to examine whether the United States was subject to an armed attack when it destroyed IR 655. The fact that the targeted aircraft was a civil aircraft with absolutely no military capability presents the United States with an insurmountable hurdle in this respect. For it is impossible to see how the United States can say that it was "the victim of an armed attack" from an aircraft that was incapable of mounting such an attack.

3.94 It is also well settled that a mistake in identification will not excuse a resort to armed force in alleged self-defence when no threat or armed attack actually exists. In the 1904 Dogger Bank incident, for instance, Great Britain demanded an indemnity from Russia when the Commander of the Russian Baltic Fleet, then on its way to the Far East to take part in the Russo-Japanese War, fell under the mistaken belief that Russian warships were being attacked in the North Sea by disguised Japanese torpedo boats. The international commission which reviewed the affair did not find that any torpedo boats had been present, and it determined that the firing, which was directed at what turned out to be British fishing trawlers, was not justified. Russia subsequently paid an indemnity[1].

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 103, para. 195.

3.95 A similar situation arose in the case of The Jessie between Britain and the United States where U.S. naval officers unlawfully boarded a British vessel in the North Pacific[2]. Even though this was a breach of British sovereignty, the United States attempted to deny responsibility on the grounds that it was not liable for errors in judgment of its agents. The French arbitrator -

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[1] See, Mandelstam, "La Commission internationale d'enquête sur l'incident de la Mer du Nord", 12 Revue générale de droit international public 161, 351 (1905); Coussirat-Coustère and Eisemann, op. cit., pp. 507-508.

[2] 6 R.I.A.A. (1921), p. 57.

M. Fromageot, a former member of the Permanent Court - rejected this argument. He held:

> "It is unquestionable that the United States naval authorities acted bona fide, but though their bona fides might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties[1]."

3.96 In this connection, the reasoning of Commissioner Nielsen, in his opinion in the Kling Claim, should also be noted[2]. After observing that the killing of an alien or a citizen by a soldier is always a serious matter, Commissioner Nielsen held:

> "In cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountablility for mistaken action[3]."

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[1] Cited in, Coussirat-Coustère and Eisemann, op. cit., at p. 508.

[2] Kling v. United Mexican States, 4 R.I.A.A. (1930), p. 575.

[3] Cited in, Coussirat-Coustère and Eisemann, op. cit., at p. 506.

3.97 As the Court held in the Nicaragua case, "(i)n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack[1]." Apart from the need to demonstrate that it was confronted with an armed attack before a State can legitimately justify its use of force in self-defence, a State must also show compliance with the criteria of necessity and proportionality. The Court in the Nicaragua case found that the United States agreed:

> "... in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence[2]."

3.98 In that case, the Court did not have to consider in any depth the application of the criteria of necessity and proportionality since the "condition *sine qua non* required for the exercise of the right of collective self-defence by the United States" was not fulfilled - that is, the condition of an armed attack against the United States[1]. The Court said in this respect:

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 103, para. 195.

[2] Ibid., p. 103, para. 194. This view has also been confirmed by the former U.S. Agent in this case: see, A. Sofaer, op. cit., at p. 919, where the author states that "the use of force against another country's territorial integrity or political independence is prohibited, except in self-defense and any use of force must be both necessary and proportionate to the threat it addresses".

> "As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness[2]."

The Court went on to find that neither criterion could in fact be met by the United States, just as in the case here, as will be demonstrated in Part IV.

3.99 In his dissenting opinion in the Nicaragua case, Judge Schwebel discussed the application of necessity and proportionality, quoting extensively from Judge Ago's report to the International Law Commission[3]. Without in any way endorsing the views set out in Judge Schwebel's dissent, it is instructive to note certain remarks of Judge Ago quoted there. In discussing these two criteria, Judge Ago described them as-

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 122, para. 237.

[2] Ibid.

[3] See, Judge Schwebels's Dissenting Opinion, I.C.J. Reports 1986, p. 362, paras. 201, et seq. See, also, Yearbook of International Law Commission, 1980, Vol. II, Part One, p. 69.

> "... two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale[1]."

3.100 Applying this rule of law here, the action of the United States in shooting down flight IR 655 was neither necessary nor proportionate, even if it had been in response to an armed attack, which was not the case. These conclusions will be taken up in detail in the next Part.

F. Customary International Law of Neutrality

3.101 The U.N. Security Council failed to recognize the aggressor in the Iran-Iraq armed conflict and failed to take any measure to restore the peace during the conflict. Accordingly, the principles of the law of neutrality found in customary international law must be applied to this conflict. This is particularly true in respect to the United States for it has, throughout the conflict, repeatedly stated its neutrality. Indeed, upon the outbreak of the armed conflict in September 1980, the United States announced that it would observe "a strict and scrupulous attitude of neutrality[1]." This policy was subsequently re-emphasized on many occasions. Relying on this stated neutrality, the Islamic Republic accorded the United States the rights of neutrals under customary international law and expected the United States to observe its obligations under that law.

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[1] See, Judge Schwebel's Dissenting Opinion, I.C.J. Reports 1986, p. 368, para. 212.

3.102 Under Articles 9, 7 and 8 of the 1907 Hague Convention (No. V.), a neutral State is obligated to maintain its impartiality to both belligerents with respect to the provision of arms, munitions of war, telecommunication services and, in general, anything which might be of use to an army or a fleet, and to ensure that the same obligation is observed by its private companies and nationals. Articles 6, 7, 8 of the 1907 Hague Convention (No. XIII) provide that a neutral State is forbidden from supplying in any manner a belligerent power war material of any kind, including anything which could be of use to an army or fleet, and that a neutral State is also bound to prevent the fitting out or arming of any vessel within its jurisdiction which is intended to cruise, or engage in hostile operations, for use in war or against a power with which that State is at peace.

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[1] Statement of the United States delegate at the meeting of the Security Council. 17 U.N. Chronicle 7 (Nov. 1980).

3.103 State practice in maritime warfare since 1945 has been consistent in the application of the law of neutrality. Upon signing the 1982 Convention on the Law of the Sea, a major neutral power, Sweden stated in this regard:

> "It is also the undertaking of the Government of Sweden that the Convention does not affect the rights and duties of neutral states provided for in the Convention concerning the Rights and Duties of Neutral Powers in the case of Naval Warfare (XIII Convention) - adopted at the Hague on 18 October 1907[1]."

In maritime conflicts in the post 1945 period, both the rights and duties of neutral vessels have been observed by belligerents. Thus, the United States, in its close blockade of North Korea, demanded fulfillment of neutral duties as it did in the Cuban missile crisis and the Vietnam war.[1] Egypt, in the Suez crisis of 1956, initiated a traditional contraband system which sought to enforce the observance of neutral obligations, a practice which was repeated on a smaller scale in the India-Pakistan War of 1965[2]. The United Kingdom called upon neutral vessels to observe these obligations in the 1982 Falkland/Malvinas Islands conflict with Argentina. As will be shown in Part IV below, the United States has departed from this State practice and has repeatedly violated the laws of neutrality in the Iran-Iraq conflict by siding with and aiding Iraq[3]. It was this course of conduct that led, inter alia, to the treatment of IR 655 as a hostile aircraft and to its destruction.

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[1] Multilateral Treaties Deposited with the Secretary General - Status as at 31 December 1988, p. 766.

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[1] B.A. Clark, "Recent Evolutionary Trends Concerning Naval Interdiction of Sea-Borne Commerce as a Viable Sanctioning Device", 27 J.A.G. 160, 161 (1973).

[2] P. Norton, "Between the Ideology and the Reality: The Shadow of the Law of Neutrality", 17 Harv. Int'l. L.J. 249, 261 (1976); see, also, S. Dinitz, "Legal Aspects of the Egyptian Blockade of the Suez Canal", 45 Georgia L.J. 169 (1956).

[3] See, also paras. 1.36, et seq., below.

PART IV

APPLICATION OF THE LAW TO THE FACTS

4.01 Having considered the principles and rules of international law applicable to this case, it is now appropriate to apply these principles and rules to the facts as recounted in Part I. This will be done under two headings: (i) the deployment and conduct of the U.S. fleet in the Persian Gulf leading up to the incident; and (ii) the actual shooting down of IR 655.

A. The Deployment and Conduct of the U.S. Fleet in the Persian Gulf

4.02 It is important to address this issue first because, to a large extent, it was the presence and conduct of the U.S. fleet prior to the actual destruction of IR 655 which was a contributing factor to the unlawful act of shooting down the plane. This conduct violated international law in a number of respects. Moreover, these violations have continued since 3 July 1988. First, the activities of the U.S. warships before the incident, on the day in question, and subsequently, have violated the Islamic Republic's sovereignty and the principle of non-intervention. These activities also constitute and continue to be an illegal interference in the Islamic Republic's commerce and navigation. Second, the fleet's presence in the Persian Gulf and the operation of the NOTAM issued by the United States in 1984 and expanded in 1987 violated and continue to violate fundamental principles of international air law. In particular, the NOTAMs, whereby the United States threatened to take "defensive measures" against unidentified aircraft flying within 5 nautical miles of a U.S. warship and at an altitude of less than 2000 feet, are completely unlawful[1]. Consequently, they provide no legal justification for the actions that the U.S. warships took against IR 655 on 3 July 1988 (or any other challenges of other aircraft either before or after the 3 July incident) even if the United States had abided by their terms which, as shall be seen, has not been the case. Each of these aspects will be discussed below.

1. Violation of the Islamic Republic's Sovereignty and Unlawful Interference in its Commerce and Navigation

4.03 In September 1980, the Islamic Republic was the victim of an armed attack by Iraq. While these proceedings are not the place to litigate the issues relating to the hostilities that ensued, the fact remains that the Islamic Republic was in a state of imposed war throughout the period from 1980 to 20 August 1988. As such, the Islamic Republic had the right, recognized in international law, to take certain measures, such as visit and search of merchant vessels in the Persian Gulf, in order to ensure that they were not carrying war contraband destined for the enemy.

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[1] Although these NOTAMS have been transformed into "information" (see, para. 4.28, below) the United States continues to follow the same procedures in challenging aircraft as were set out in the NOTAM.

4.04 As has been seen in Part I, the United States professed to take a neutral stance in the war. Despite this publicly proclaimed position of neutrality, in fact the United States took sides with Iraq in the deployment of its forces in the Persian Gulf[1]. This bias against the Islamic Republic has been confirmed by Caspar Weinberger, the United States Secretary of Defense at the time and the individual who was directly responsible for the command of the U.S. forces in the Persian Gulf[2].

4.05 The Defense Department Report makes it clear that one of the direct consequences of this partiality was that planes and boats originating from the Islamic Republic were automatically assumed to be hostile to the U.S. forces even if there was no corroborating evidence for such an assumption[1]. Another consequence was that U.S. forces in the Persian Gulf were "trigger-happy", to use the words of the Soviet Union, vis-à-vis Iranian craft[2]. It was this policy and this attitude which must in part have led the crew on board the *Vincennes* to classify IR 655 as "hostile" immediately after its take-off from Bandar Abbas.

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[1] See, para. 4.33, et seq., below.

[2] See, para. 1.42, above.

4.06 As for the *Vincennes*, the Commander of its companion ship - the *Sides* - has already attested to the fact that "her actions appeared to be consistently aggressive", that "an atmosphere of restraint was not her long suit", and that her crew "hankered for an opportunity to show their stuff[3]". In other words, in taking up its position within the Persian Gulf prior to 3 July 1988, and in penetrating the Islamic Republic's territorial waters on the day of the incident, the *Vincennes* was *predisposed* to treat any aircraft taking off from the Islamic Republic as hostile and was looking for an excuse to use its weapons. What this means is that the conduct of the *Vincennes*, as well as the presence of the U.S. fleet as a whole, was a pre-planned show of force specifically intended to intimidate and threaten the Islamic Republic.

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[1] The Defense Department Report is telling in this regard. It stated that as long as hostilities continued in the area, "Commercial air, *particularly commercial air from Iran*, is at risk...." (*Defense Department Report*, p. E-52; emphasis added.)

[2] *See*, *International Herald Tribune*, 5 July 1988 (*Exhibit 24*).

[3] *See*, para. 1.62, above

4.07 Despite being confronted with this kind of provocation, the Islamic Republic exercised a considerable measure of restraint. One can imagine how the United States would have reacted if a foreign State had amassed its forces just off the coast of the United States and made similar threats. Yet the Islamic Republic did not rise to the bait. To the contrary, the U.S. Secretary of Defense at the time noted that the Islamic Republic demonstrated "a decided intent to avoid American warships[1]". This was confirmed by Commander Carlson of the Sides who remarked that in his experience, the Iranian military forces were "non-threatening" in the month preceding the incident and "direct and professional in their communications[2]". As also noted above, the Islamic Republic's military aircraft consistently heeded challenges by the U.S. naval forces in the Persian Gulf and took steps to avoid them[3].

4.08 According to the Defense Department Report, notwithstanding the "non-threatening" and "professional" conduct of the Islamic Republic's military forces, on the morning of 3 July 1988 the Vincennes despatched its helicopter over the Islamic Republic's internal and territorial waters in order to intercept a number of small coastal patrol boats which the Montgomery thought might be going to attack merchant shipping. Significantly, all the Defense Department Report says about this incident is that the Montgomery heard the small boats "questioning" a merchant vessel over bridge to bridge[1]. Even had this been true, which the Islamic Republic denies, it would have been entirely consistent with the Islamic Republic's right under municipal and international law to visit and search vessels in order to ensure that war contraband was not being transported to Iraq.

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[1] Weinberger, op. cit., p. 401 (Exhibit 8).

[2] See, para. 1.106, above.

[3] See, para. 1.54, above.

4.09 What is crucial is the fact, also acknowledged in the Defense Department Report, that no merchant vessels requested any assistance from U.S. warships at the time[2]. It follows that there was absolutely no justification for the Vincennes' helicopter to violate the Islamic Republic's airspace on the morning of 3 July 1988, much less any justification for it to act in a threatening manner.

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[1] Defense Department Report, p. E-26.

[2] Ibid.

4.10 By the same token, for the United States subsequently to have directed its warships into the Islamic Republic's territorial sea in order to confront the small boats violated both Iranian law and international law. For the small boats were acting in an entirely legitimate fashion within the Islamic Republic's territorial and internal waters. This action was made more serious - and led to disastrous consequences - because in proceeding into the Islamic Republic's territorial sea, the U.S. warships placed themselves directly under air corridor A59. When coupled with the fact that the U.S. warships were predisposed to treat virtually any Iranian activity - whether in the air or on the sea - as hostile, the U.S. actions led to a situation where the shooting down of IR 655 became almost inevitable.

4.11 On any objective analysis, these actions were far more serious than the violations committed by Great Britain's naval forces in 1946 when they conducted unauthorized minesweeping operations within Albania's territorial sea. The latter were designed to render passage through the Corfu Channel safe, while the actions of the United States here were designed to intimidate and threaten the Islamic Republic, as well as being contrary to the self-restraint requirement of Security Council Resolution 598[1].

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[1] See, para. 1.43, above.

It is highly significant, therefore, that the Court in the Corfu Channel case emphasized that such forms of military intervention have "given rise to most serious abuses[1]". In the context of the present case, the Court's admonition has special relevance in view of the presence of a massive show of force by a superpower just off the coast of a much smaller State. As the Court stated:

> "Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself[2]."

4.12 On the basis of the foregoing, it must be concluded that the conduct of the United States' naval forces in the Persian Gulf violated the Islamic Republic's territorial sovereignty and the principle of non-intervention under customary international law, and breached the United States' obligation under Article X(1) of the Treaty of Amity to guarantee to the Islamic Republic freedom of commerce and navigation. In and of itself, this conduct led to the reckless endangerment of civil aviation in contravention of Articles 44(a) and (h) of the Chicago Convention. Moreover, in sending a helicopter from a U.S.

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[1] Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 35.

[2] Ibid.

warship with aggressive intent and without authorization or justification into the Islamic Republic's airspace on 3 July 1988, the United States also violated Articles 1 and 2 of the Chicago Convention, as well as related principles of customary international law.

4.13 The actions of the United States in moving its warships into the Islamic Republic's territorial waters were exacerbated by the NOTAM the United States had issued in 1984 and its expanded version of 1987. These purported to create a zone (a sort of floating bubble) around every U.S. warship within which any aircraft that entered could be "at risk" and subject to U.S. "defensive measures". By issuing a NOTAM through its Washington office the United States tried to legitimize this "defence zone". In fact, the United States had no authority to issue a NOTAM in anything but its own FIR. The NOTAM was thus illegally issued and, hence carried no legal force. Moreover, an examination of the facts in this case reveals that in shooting down IR 655, the United States failed even to abide by the provisions of its own NOTAM.

4.14 Because of the importance of this point to the U.S. position, it is necessary to examine the NOTAM in some detail. This is done in the following section.

2. The Unlawful NOTAMs

4.15 As noted in paragraph 3.48 above, there was and continues to be a comprehensive regulatory regime governing territorial and high seas airspace for the whole Middle East region. The MID RAN States were given full responsibility under the auspices of ICAO to establish the procedures, pursuant to the Annexes of the Chicago Convention, necessary to ensure the safety of civil aviation within the region and they carried out this mandate properly.

4.16 In January 1984 the United States promulgated a NOTAM warning aircraft of the dangers of approaching U.S. warships stationed in the Persian Gulf. Following the attack on the USS Stark by Iraq in September 1987, the United States even expanded the NOTAM. However, in neither case did the United States make any attempt to follow the lawful procedure to obtain the authorization of the States directly responsible for the safety of civil aviation in the region who had the sole right to issue NOTAMs in their FIRs[1]. As noted in the ICAO Report at paragraph 2.2.4.:

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[1] See, para. 3.52, above.

> "The United States NOTAM concerning the (Persian) Gulf, Strait of Hormuz, Gulf of Oman and Arabian Sea covered an area within the responsibility of International Notam Offices Abu Dhabi, Baghdad, Bahrain, Bombay, Karachi, Kuwait, Muscat and Tehran. Therefore, the promulgation of the NOTAM was not in conformity with the provisions of ICAO Annex 15."

4.17 The Government of the Islamic Republic made a clear protest to ICAO in the following terms when the 1984 NOTAM was issued:

> "Reference is hereby made to the (Special Notice) issued by KDCAYN to OIIIYN, dated 22 (January 1984) regarding restriction of overflight above certain areas of high seas in the Persian Gulf and the Sea of Oman. The notice is a clear violation of international law and common practices regarding the freedom of flying over the high seas. It is indeed a flagrant infringement of principles laid down by the Chicago Convention on Civil Aviation as well as other Conventions regarding the Law of the Sea.
>
> The notice which purports to claim sovereignty over undefined areas of the high seas in the Persian Gulf, Sea of Oman and Arabian Sea is basically unfounded and legally invalid and unacceptable.
>
> The Islamic Republic of Iran considers the Special Notice as a direct interference in the internal affairs of the Coastal States of the Persian Gulf and the Sea of Oman and a threat against the safety and security of international air and sea navigation[1]."

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[1] The text of this telex is set out in ICAO Doc. MID/3-WP/108, p. 2. A copy of this document is attached at Exhibit 61.

4.18 This protest was reiterated following the issuance of the 1987 NOTAM. On 14 September 1987, a telex addressed to the President of ICAO from the Islamic Republic's Vice-Minister of Roads and Transportation stated the protest in the following terms:

> "This NOTAM is another clear violation of ICAO provisions and international law, the words at the end of the NOTAM to the effect that undue interference with freedom of navigation and overflights would be avoided (are) most puzzling and dangerous since so far as ICAO provisions (are) concerned naval vessels of Contracting States have no recognized role in air navigation within international airspace. On the other hand the NOTAM has not even excluded the airspace over territorial waters north of 20N in the interests of safety of international air navigation and for the strict observance of Chicago Convention your immediate action will be highly appreciated[1]."

4.19 As noted in Part III, the Paris meeting of 6 October 1988 expressed its belief that the 1987 NOTAM was "in contravention of approved ICAO Standards and Recommended Practices" and called upon the ICAO Council to take measures to have the NOTAM withdrawn. After examining the U.S. NOTAM, the 1984 MID RAN Meeting established as a policy recommendation for the whole Middle East Region -

> "that States should make, as a matter of urgency, a review of any restrictions or prohibitions that they have imposed in the

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[1] See, ICAO Doc. C-WP/8644, Attachment 7 (Exhibit 15).

> airspace over the high seas with a view to eliminating them[1]."

The MID RAN States were deeply concerned about the congestion and difficulties posed to air navigation in the Middle East. They had taken steps to minimize these problems through improved civil-military co-ordination and the establishment of a policy of eliminating restrictions (such as were purported to be created by the U.S. NOTAMs) in the Region. The restraint exercised by the littoral States in the Middle East Region regarding restrictions on navigation in their own respective FIR is in marked contrast to the behaviour of the United States, which exercises no sovereignty in the region whatsoever.

4.20 In the light of the foregoing, it is evident that the United States' NOTAM was *ultra vires* and a legal nullity since it was not issued in compliance with the prescribed legal procedures. In such circumstances, it constituted an unlawful interference with, and danger to, civil aviation, and it directly led to the downing of IR 655. The actions of the U.S. fleet in challenging civilian aircraft and forcing them to deviate from their assigned routes pursuant to the NOTAM were also unlawful[1].

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[1] *See*, ICAO Doc. MID/3-WP/108 (*Exhibit 61*). *See*, para. 3.46 above. The Report of the MID RAN Meeting was confirmed by the ICAO Council.

4.21 Even had the NOTAM been issued by the competent authority, its text was manifestly inadequate for the purpose for which it was intended. Under Annex 15 of the Chicago Convention, a NOTAM must be "of a temporary nature" and "adequate, accurate and timely"[2]. The 1987 U.S. NOTAM was none of these, and thus represented a violation of Annex 15 of the Chicago Convention. The NOTAM read:

> "In response to the recent attack on the USS Stark and the continuing terrorist threat in the region, U.S. naval vessels operating within the Persian Gulf, Strait of Hormuz, Gulf of Oman, and the Arabian Sea, north of 20 degrees north, are taking additional defensive precautions. Aircraft (fixed wing and helicopters) operating in these areas should maintain a listening watch on 121.5 mHz VHF or 243.0 mHz UHF. Unidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted on these frequencies and requested to identify themselves and state their intentions as soon as they are detected. In order to avoid

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[1] In its protest to the 1984 NOTAM, the Islamic Republic had made it clear that -

> "the United States of America will be held responsible for all consequences resulting from such violation."

See, Exhibit 61, p. 2.

[2] See, paras. 3.49-3.52, above.

> inadvertent confrontation, aircraft (fixed wing and helicopters) including military aircraft may be requested to remain well clear of U.S. vessels. Failure to respond to requests for identification and intentions, or to warnings, and operating in a threatening manner could place the aircraft (fixed wing and helicopters) at risk by U.S. defensive measures. Illumination of a U.S. naval vessel with a weapons fire control radar will be viewed with suspicion and could result in immediate U.S. defensive reaction. This notice is published solely to advise that measures in self-defense are being exercised by U.S. naval forces in this region. The measures will be implemented in a manner that does not unduly interfere with the freedom of navigation and overflight (FAA FDC 052/87).
>
> U.S. Naval Forces in the Persian Gulf, Strait of Hormuz, Gulf of Oman, and Arabian Sea (North of 20 Degrees North) are taking additional defensive precautions against terrorist threats. Aircraft at altitudes less than 2000 ft. AGL which are not cleared for approach/departure to or from a regional airport are requested to avoid approaching closer than 5 nm to U.S. Naval Forces.
>
> It is requested that aircraft approaching within 5 nm of U.S. Naval Forces establish and maintain radio contact with U.S. Naval Forces on 121.5 mHz VHF or 243.0 mHz UHF. Aircraft which approach within 5 nm at altitudes less than 2000 ft AGL whose intentions are unclear to U.S. Naval Forces may be held at risk by U.S. defensive measures. This is a joint USCINCPAC and USCINCCENT NOTAM affecting operations within their respective area of responsibility. (112119 KFDC)[1]"

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[1] *See*, *ICAO Report*, Appendix F, p. F-4. The second and third paragraphs of the above NOTAM are a verbatim repetition of the 1984 NOTAM. The first paragraph represents a gloss on the prior NOTAM in the light of the *USS Stark* incident.

4.22 The 1984 NOTAM had purported to establish a restricted or danger area bounded by a lateral limit of 5 nautical miles together with a vertical limit of 2000 feet which aircraft "not cleared for approach/departure to or from a regional airport (were) requested to avoid"[1]. This area was inherently mobile, since it shifted along with each naval vessel. As a result, the NOTAM was contrary to the Chicago Annexes under which the principles of definition, clarity, certainty and safety all required that fixed limits be communicated to aircraft commanders before they filed their flight plans.

4.23 What the United States was attempting to do was to establish a type of "floating defence identification zone" analogous to the air defence identification zones established by some States, including the United States, over high seas airspace adjacent to their own territorial airspace. Apart from the fact that the NOTAM was unlawful and ultra vires, such a floating defence identification zone - which was tantamount to an attempt to create a zone of sovereignty around each U.S. warship - is without basis in international law and was objected to in categoric terms by the Islamic Republic.

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[1] Of course IR 655 was so "cleared".

4.24 The first paragraph of the 1987 NOTAM attempted to go even further. It provided that "(u)nidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted ... and requested to identify themselves and state their intentions as soon as they are detected". This purported to extend the limits of the floating defence identification zone out as far as the technology aboard the vessel would allow. In the case of the AEGIS system, this would be 250 nautical miles in all directions from any U.S. vessel carrying such a system[1]. Such action is manifestly unsafe, unreasonable and contrary to law.

4.25 Moreover, the existence of such a NOTAM violated the authority of the ATS providers in the region and infringed on the FIR boundaries of the Persian Gulf States. It also flew in the face of the MID RAN States' exclusive responsibility for flight safety in the region. Not least of all, it amounted to a breach of the principle of territorial sovereignty enshrined in Articles 1 and 2 of the Chicago Convention in that the NOTAMs, by their terms, covered territorial airspace belonging to other States in the area, including the Islamic Republic.

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[1] See, para. 1.60, above. No indication is given as to how an aircraft might know if it had been "detected".

4.26 This violation of sovereignty can be seen by the fact that when a United States warship approached or entered the territorial sea of a littoral State in the region, as happened on 3 July 1988, the 5 mile - 2000 feet zone established by the NOTAM would travel with it, penetrating into territorial and in some cases internal waters including the superjacent airspace. The 1987 version of the NOTAM was automatically violative of sovereignty in that it resulted in the extension of the floating defence identification zone over the mainland of littoral States, particularly the Islamic Republic. This is fundamentally contrary to the regime established by the community of nations in the Chicago Convention to govern global airspace utilisation.

4.27 Instead of withdrawing the NOTAM after the 3 July 1988 incident, the Defense Department Report recommended that it should be extended even further. The Report called on the United States Government to warn the Government of the Islamic Republic "that any fixed-wing aircraft flying over the waters of the Persian Gulf to or from Iran is suspect as to its intentions towards U.S. Naval Units[1]". The recommendation went on to say that aircraft would only be regarded as a non-threat if they transited the

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[1] *Defense Department Report*, p. E-55.

Persian Gulf at an altitude of over 25,000 feet[1]. This would effectively force all Iranian civil aircraft to take off inland, climb to 25.000 feet and then turn and fly back over the Persian Gulf. This recommendation is indicative of the total lack of consideration by the United States for the principles of air safety, free commerce and navigation, and territorial sovereignty. It is "gunboat diplomacy" at its worst.

4.28. This "gunboat diplomacy" is most abhorrent where in the ICAO Council Session that dealt with the IR655 incident and led to the 17 March 1989 Decision, the United States, at the 13 March 1989 meeting by using the incident as a lesson to the Persian Gulf States, "cancels" its illegal NOTAMs with the condition that the Persian Gulf Provider States disseminate to all concerned the U.S. NOTAMs as "information,"[2]-"potentially hazardous to the civil aircraft operations" and "essential to the safety of civil aviation" to "ensure that accidents such as the Iran Air flight 655 tragedy do not occur again."[3] The safety of international civil aviation must not be allowed to be so obviously abused. While ATS authorities may promulgate this "information" for safety reason this does not avoid the fact that the Persian Gulf States have refused to issue it as their own NOTAM and its unabated operation by the U.S. warships continue to be quite dangerous and totally illegal.

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[1] Defense Department Report, p. E-53.

[2] See, Exhibit 40, p. 10.

[3] Ibid.

3. The Implications of Recommendation 2.6/1 of the Third MID RAN Meeting

4.29 The NOTAMs and the actions of the U.S. fleet were also in conflict with Recommendation 2.6/1 of the Third Middle East Regional Air Navigation (MID RAN) meeting of ICAO held in Montreal from 27 March to 13 April 1984. The subject of Recommendation 2.6/1 was "Civil/Military Coordination". Its purpose was to achieve the "optimum joint (civil/military) use of airspace with a maximum degree of safety, regularity and efficiency of international civil air traffic". This is a principle enshrined in paragraph 2.14 of Annex 11 of the Chicago Convention[1].

4.30 Recommendation 2.6/1 called upon States in the region to take a number of actions, including the following:

- To establish appropriate civil/military coordination over civil and military problems of airspace management and air traffic control;
- To ensure daily integration or separation of civil and military traffic operating in the same or immediately adjacent areas of airspace;
- To refrain to the extent possible from establishing prohibited, restricted or danger areas which could not, in any event, be established over international waters.

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[1] See, para. 3.40, above.

- To review as a matter of urgency any restriction they may have imposed in the airspace over the high seas with a view to eliminating them[1].

4.31 As noted in Part III above, a chain of communication is provided for in international air law in order to protect civil aviation from harm while in flight. The civil aviation authority of State A which wishes to conduct operations in the FIR of States B and C is under a duty to seek out the civil aviation authorities of States B and C in order to apprise them of its intentions and obtain their agreement. It is then up to States B and C to formulate and issue any NOTAM which might be necessary and to effect co-ordination with the military units in their respective FIR in order to ensure that all aircraft may remain inviolate, including civilian ones.

4.32 The MID RAN States in their Recommendation 2.6/1 went a step further in giving even greater emphasis to civil-military co-ordination and, especially, in limiting the freedom of States in the area to establish prohibited, restricted or danger areas which disrupt civil aviation. The conduct of the United States in issuing its two unlawful NOTAMs and the activities of its warships pursuant thereto was tantamount to arrogating sovereignty over areas of the Persian Gulf which would move with the location of the warships. All this ignored completely the responsibility delegated to the MID RAN States for their own region.

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[1] See, Exhibit 59.

4. The United States' Violation of the Law of Neutrality

4.33 The United States' show of force in the Persian Gulf was not for the alleged protection of neutral shipping but was part of a larger scheme through which the United States sided with and assisted Iraq in the eight-year conflict with the Islamic Republic. It was this partiality to Iraq and hostility to the Islamic Republic that was the basic motive for the international crime committed by the United States on 3 July 1988. It also helps to explain why the United States has been so adamant in refusing to admit its responsibility for this crime or to take steps to prevent its recurrence, for behind it has lurked this basic hostility. The facts available concerning these violations of neutrality are necessarily limited since the U.S. operations involved were covert, and what has been disclosed can only be regarded as the tip of the iceberg.

4.34 From the very outset of the Iraqi war, the United States Airborne Warning and Control Aircraft (AWACS"), which had been stationed in Saudi Arabia for the alleged purpose of the legitimate self-defence of that country, proceeded to supply Iraq with intelligence information they had collected on Iranian military movements[1]. This operation began in 1980 and continued throughout the eight-year war.

4.35 The United States also lent its continued support to a comprehensive campaign to destablize the Islamic Republic's Government by means of C.I.A. sponsorship of paramilitary raids launched from Iraq into the Islamic Republic by various Iranian contra groups. It also tried to promote an internal military coup d'etat.[2] Moreover, in March 1982, the United States removed Iraq from the official list of States to whom American companies were prohibited from selling "dual-use" equipment and technology that could readily be employed for either civilian or military purposes, and would most probably be used for the latter[3]. However, the United States maintained the Islamic Republic on that list and continued to bar it from the purchase of such "dual-use" material. As a result, in June 1982, the United States issued a license permitting the export of six Lockheed L-100 civilian transport aircraft to Iraq[1]. Although the sale of the aircraft was licensed to Iraqi Airways, the L-100 is the civilian version of the Lockheed C-130 Hercules military transport and troop carrier[2]. Four months later, the United States licensed the sale of six small jets to Iraq, four of which admittedly possessed military applications[3].

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[1] J. McGuish and A. Terry, "How U.S. Sky Spies Help Iraq's War", Sunday Times (London), 7 March 1985, sec. 1, p. 21.

[2] D. Alpern, et al, "America's Secret Warriors", Newsweek, 10 October 1983, pp. 38-45; J. Peretzell, "Can Congress Really Check the CIA?", Washington Post, 24 April 1983, p. 61; "CIA Courted Iran Exiles for 7 Years", International Herald Tribune, 20 November 1986, p. 1, col. 1.

[3] David Ignatius, "Iraq is Turning to U.S., Britain for Armaments", The Wall Street Journal, 5 March 1982, p. 22, col. 1.

4.36 At the end of 1983, it was disclosed that the United States had informed various "friendly" nations in the Persian Gulf that the Islamic Republic's defeat of Iraq would be "contrary to U.S. interests" and that steps would be taken to prevent this result[4]. In April 1984, it was revealed that President Reagan had signed two National Security Decision Directives to set the stage for the United

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[1] Bureau of National Affairs, U.S. Export Weekly, 6 June 1982, 312.

[2] "A Tilt Towards Baghdad?", The Middle East, June 1982, 7; New York Times, 18 July 1983, p. 3, col. 1.

[3] "U.S. Licenses Sale to Iraq of Small Jet", Washington Post, 14 September 1982, p. 12, col.1.

[4] Don Oberdorfer, "U.S. Moves to Avert Iraqi Loss", Washington Post, 1 January 1984, p. 1, col.1; David Ignatius, "U.S. Tilts Towards Iraq to Thwart Iran", Wall Street Journal, 6 January 1984, p. 20, col. 1.

States to take a more confrontational stance against Iran.[1] Moreover, in May 1984, it was revealed that the United States was prepared to intervene militarily in the Iraq-Iran war in order to prevent an Iranian victory that would install a so-called "radical" Shiite government in Baghdad[2].

4.37 In November 1984 the United States reinstituted normal diplomatic relations with Iraq, severed since the 1967 Arab-Israeli war,[3] which although not per se violative of neutrality, it indicates the depth of the assistance the United States gave Iraq during the war while it had no such relations with the Islamic Republic.

4.38 In February 1985, Textron's Bell Helicopter Division was allowed to sell 45 large helicopters to Iraq, and Iraqi defence officials were involved in negotiating this transaction[4]. Subsequently, it was revealed that these helicopters were intially developed as

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[1] Middle East Policy Survey, No. 102 (20 April 1984), p. 1.

[2] G. Gutman, "U.S. Willing to Use Air Power to Keep Iran From Beating Iraq", Long Island Newsday, 20 May 1984, 3; Ignatius, op. cit., Wall Street Journal, 6 January 1984.

[3] Mansour Farhang, "The Iran-Iraq War", 2 World Policy Journal (1985), p. 671.

[4] David Seib, "Textron's Bell Unit and Iraq Seem Near Final Agreements on Sale of 45 Helicopters", Wall Street Journal, 28 February 1985, p. 32, col. 5.

Iranian troop carriers and a United States offficial stated that the helicopters were "clearly a dual-use item" with "a potential for military use[1]."

4.39 In April 1989, the Islamic Republic disclosed what the United States considered as one of the Central Intelligence Agency's rare successes in Iran: a network of agents who provided intimate details and documents about Iran's military planning. Several U.S. officials subsequently admitted "that before it was compromised, the effort yielded valuable military intelligence, particularly about Iran's operations in the (Persian) Gulf at a time when U.S. naval forces were confronting the Iranians". These U.S. officials also admitted that "the CIA network in the Iranian military was coordinated by the agency's Iran station in Frankfurt[2]".

4.40 Starting on 21 July 1987, the United States began to reflag 11 Kuwaiti tankers through a specially-formed Chesapeake Shipping Company to maintain an American appearance, and to provide an excuse for escorting them through the Persian Gulf and preventing the Islamic

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[1] David Ottaway, "U.S. Copter Sales to Iraq Raises Neutrality Issue", Washington Post, 13 September 1985, p. 1, col. 6.

[2] Stephen Engelberg and Bernard Trainor, "Its Spied Exposed, U.S. Gropes in Iran", International Herald Tribune, 9 August 1989, p. 1.

Republic's enforcement of Kuwait's compliance with its duties as a neutral state. Kuwait had also become a de facto ally of Iraq in the war. This reflagging was most abusive and provocative. It was abusive both of the law relating to the nationality of vessels as well as of the laws of neutrality. It was temporary, and its sole purpose was to allow U.S. warships to escort the reflagged ships and thus avoid Iranian stop and search measures. After those measures terminated, the Kuwaitis asked for the withdrawal of U.S. nationality from the ships. Thus, it was an obvious cover given by an alleged neutral government for a supporter of one of the belligerents. The United States was quite aware, in taking these actions, of the Iranian characterization of the Kuwaitis and of the Islamic Republic's protests against the reflagging policy.

4.41 These actions, and the jamming of Iranian Air Force telecommunications on 14 May 1988 referred to above[1], clearly indicate that the United States violated the duties of a neutral government under both 1907 Hague Conventions (Nos. V and XIII), and under customary international law as reflected in these Conventions. The United States' proclamation of neutrality and its benefitting from the advantages of neutrality clearly implied its obligation to observe these duties under international law and its acceptance of them.

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[1] See, para. 1.41, above.

5. Conclusions

4.42 The ICAO Report itself acknowledges that the United States disregarded the safety provisions in the Chicago Convention. It emphasizes the numerous problems to international civil aviation that the presence and activities of naval forces in the Persian Gulf area caused[1], and it points out that the positioning of warships was done in total disregard of civil aviation requirements.

4.43 Indeed, the United States is indicted by ICAO in its Report on the fate of IR 655 at paragraph 2.8.4. in the following terms:

> "There was no co-ordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the Gulf area. Such co-ordination would have enabled or at least facilitated identification of civil flight operations[2]."

The necessity for such co-ordination is enshrined in Annex 11 of the Chicago Convention and is essential to ensure air safety pursuant to Articles 44(a) and (h) of the Convention.

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[1] ICAO Report, para. 2.3.1.

[2] See, also, the ICAO Report's findings about the U.S. NOTAM (ICAO Report, para. 2.2.5, cited at para. 4.63, below).

The United States totally disregarded these principles. In so doing, it not only violated the Chicago Convention, it also contributed to the situation which led to the downing of IR 655.

4.44 The various violations described above should all have been condemned by the ICAO Council when it took its decision in March 1989. For the United States had shown a callous disregard for the safety of international civil air operations in the Persian Gulf. Its actions interfered with the Islamic Republic's freedom of commerce and navigation, and constituted a violation of its territorial sovereignty. Most seriously, these actions, when combined with the illegal and aggressive conduct of the U.S. fleet in general, resulted in a situation in which the criminal act of shooting down IR 655 was almost bound to occur. It was the Council's duty to recognize and rule on these facts.

4.45 The conclusion that the United States persistently interfered with air navigation is confirmed by the fact that several other incidents have occurred since 3 July 1988 in which disaster was narrowly averted by the action of the Islamic Republic's civil air authorities. These incidents, which took place on 3 January, 3 March, 5 May and 5 June 1989 (the latter occurring three weeks _after_ the filing of the Application in this case) were all reported to ICAO. Their significance lies in the fact that the continued presence of the U.S. fleet in the Persian Gulf, coupled with the United States' ongoing failure to use proper means for civil/military co-ordination, makes a repetition of the IR 655 tragedy a distinct possibility and constitutes a continuing violation of international law[1].

B. The Shooting Down of Flight IR 655

4.46 The act of the United States in shooting down IR 655 constituted a flagrant breach of the Chicago and Montreal Conventions and the Treaty of Amity, each of which, as has been shown in Part III, explicitly or implicitly prohibits the use of force against civil aircraft or interference with commerce and navigation. Such an act also violated Article 2(4) of the United Nations Charter, which (like Article 3 *bis* of the Chicago Convention) reflects the customary rule prohibiting the use of force underlying the relevant conventional provisions.

4.47 Essentially two arguments have been made to justify the United States' actions in this incident. The first is that the shooting down of IR 655 was accidental. This version was propounded by the Chairman of the U.S.

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[1] *See*, paras. 4.27-4.28, above.

Joint Chiefs of Staff in his report on the incident which was made part of the Defense Department Report[1]. Based solely on the Defense Department's own self-serving assessment, the ICAO Council accepted this view and found that the incident occurred "as a consequence of events and errors in identification of the aircraft" which resulted in IR 655's "accidental destruction", and did not condemn the United States for its acts. The second argument is that the United States acted in self-defence - a contention which was advanced by the United States before the United Nations Security Council and in other statements referred to above.

1. The "Accidental" Argument

4.48 There is no doubt that the shooting down of IR 655 was not an accident as might have been the case, for example, if the Commanding Officer of the *Vincennes* had slipped and activated some sort of triggering mechanism. In this sense, the ICAO Council's decision is clearly wrong because the record shows that the Commanding Officer meant to shoot down the plane that appeared on his ship's radar. The question is rather whether there was a mistaken identification of the plane and, if so, whether that mistaken identification justified in some way the shooting down of the plane or exonerated the United States from legal responsibility.

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[1] *See*, *Defense Department Report*, p. E-64.

4.49 The Islamic Republic submits that the claim that IR 655 was "misidentified" is not credible. The overwhelming weight of the evidence shows that the Vincennes, as well as its sister ships, had the capacity to, and did correctly, identify IR 655 as a civilian aircraft. In examining this question, it is appropriate to recall the test used by the United States in the Stark incident. There the United States found Iraq fully responsible for the attack on the grounds that the Iraqi pilot "knew or should have known" that he was attacking a U.S. warship[1]. A fortiori, the same can be said about the Vincennes here.

4.50 The relevant facts which show that the Vincennes could not reasonably have been mistaken about IR 655's identity are the following:

- The fact that the Vincennes possessed the highly advanced technical capabilities of the AEGIS combat system for detecting aircraft, and that the data actually recorded by the AEGIS was at all times correct and consistent with the flight profile of an Airbus A300[1];

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[1] See, the Diplomatic note presented by the United States to the Iraqi Ambassador in Washington on 20 May 1987, reprinted in 83 AJIL (1989), p. 562. A copy is attached at Exhibit 62.

- The fact that the AEGIS system correctly recorded IR 655 as squawking its commercial Mode III code throughout the flight;
- The fact that IR 655 was communicating on open radio channels with air traffic control centres in English and that the *Vincennes* and other U.S. military sources had the capacity to hear such communications[2];
- The fact that IR 655 was well within the international air corridor, ATS route A59, which had been used for years by civil aircraft flying between Bandar Abbas and Dubai;
- The fact that the correct identification of IR 655 as a civilian aircraft squawking Mode III was made by members of the crew of the *Vincennes*[3];
- The fact that the *Vincennes* possessed and was familiar with the civil aircraft schedule which showed that IR 655 was scheduled to transit the Persian Gulf when it did and that this schedule was examined by an officer of the ship at the time[4];
- The fact that, with just one exception, none of the other ships, aircraft, or air traffic control centres in the area heard

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[1] *See*, *ICAO Report*, para. 3.1.26.

[2] The *ICAO Report* wrongly found that U.S. warships were not equipped to maintain civil ATC frequencies for flight identification purposes. *ICAO Report*, para. 3.1.13. The *Defense Department Report* admits that the warships did have such capacity (p. E-53, para. 6).

[3] *ICAO Report*, para. 2.12, *et seq*.

[4] *See*, para. 1.72, above.

the warning communications allegedly sent by the *Vincennes*[1];

- The fact that since 1984 Iranian military aircraft had consistently heeded U.S. challenges and avoided U.S. naval forces;

- The fact that there was absolutely no precedent for an Iranian air attack on U.S. naval forces and that an F-14 was totally unsuitable for attacks on shipping;

- The fact that the Commanding Officer of the *Vincennes* took no action, other than to raise his hand, when being informed by his Combat Information Officer that the aircraft might be civilian[2].

- The fact that both the *Sides* and the *Montgomery* identified IR 655 as commercial and a non-threat.

4.51 Based on these factors, the Islamic Republic cannot accept the conclusion reached in the ICAO Report that the "aircraft was perceived as a military aircraft with hostile intentions[3]". The *Vincennes* was in full possession of all the facts, as was its companion ship the *Sides*, and these unmistakably showed IR 655 to be a civilian flight.

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[1] No civil air authority heard any warnings, which they certainly would have if a warning had been sent out over a commercial channel. The only military entity that has claimed to have heard any warnings was a British ship, *HMS Beaver*, working in close conjunction with the U.S. fleet in the region. The *Beaver* claimed to have heard warnings sent out over the civilian air channel which were heard at neither Bandar Abbas nor Dubai.

[2] *See*, para. 1.85, above.

[3] *ICAO Report*, para. 3.2.1.

4.52 Because the facts simply do not support a claim of accident or mistaken identification, the United States has been forced to create a psychological theory to explain the incident. However, this theory, which rests largely on the assumption that the Vincennes' crew was fatigued and under stress, is equally implausible. The Vincennes crew had only arrived in the Persian Gulf in May 1988 and were thus fresh. Indeed, this was their first taste of action. Moreover, they had been trained to handle hundreds of planes simultaneously attacking their ship under "the most intense environment that (the Defense Department) can replicate[1]". The assertion that they cracked when confronted with a single, non-threatening aircraft cannot be reconciled with the fact that the crew of the Sides and the Montgomery correctly identified the plane as commercial. Instead, what is plausible is that the Vincennes "hankered for an opportunity to show its stuff".

4.53 Even if there was a mistaken identification, this amounted to such gross negligence and recklessness on the part of the Vincennes that any characterization of the act as accidental or excusable is plainly wrong. In municipal law, the only difference between murder and manslaughter is that in order to prove the latter there is no need to show an intention to kill, but only an unlawful act which resulted in death[1]. Here, the unlawfulness of the act can be established on the objective facts: either the shooting down of IR 655 was intentional or it was grossly negligent and reckless. In either case, the United States actions still have the character of an international crime and the United States bears full responsibility.

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[1] Senate Hearings, p. 28. See, Exhibit 7.

4.54 Thus, even if it were true that the Vincennes mistakenly identified IR 655 as an F-14, this would not deprive the act of shooting it down of the attributes of an intentionally performed and unlawful act. Clearly, the Vincennes intended to shoot down the aircraft that appeared on its radar screen. Moreover, the mistaken identification of the plane as an F-14 would not have made the act of shooting it down any less unlawful. For even had it been an F-14, it would have had every right to be flying in Iranian airspace, and shooting it down in the circumstances would have violated international law.

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[1] See, for example, in connection with the destruction of the Rainbow Warrior, R v. Mafart and Prieur, before the New Zealand High Court, reprinted in 74 I.L.R. (1987) 241 at 245.

4.55 The United States is responsible for the action of the Vincennes in either case. Under international law, the test of a State's responsibility is very wide. As Professor Brownlie points out-

> "... the practice of states and the jurisprudence of arbitral tribunals and the International Court have followed the theory of objective responsibility as a general principle ...[1]."

Brownlie also observes that -

> "... objective responsibility rests on the doctrine of the voluntary act: provided that agency and causal connection are established, there is a breach of duty by result alone[2]."

4.56 As has been demonstrated in Part III, when it comes to the acts of the armed forces of a State, a very strict accountability exists whereby the State is liable even if the intention to cause damage is not shown. In this connection, it is again appropriate to quote from Commissioner Nielsen's opinion in the Kling Claim[3]:

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[1] Brownlie, System of the Law of Nations: State Responsibility, op. cit., p. 39.

[2] Ibid., p. 38; see, generally, ibid., pp. 38-47, pp. 139-141.

[3] Kling v. United Mexican States, 4 R.I.A.A. (1930), p. 579, cited in Coussirat-Coustère and Eisemann, op. cit., at p. 506. In his Opinion, Nielsen refers to a number of other cases where this principle has been upheld (e.g., the Falcon and Garcia and Garza cases).

> "In cases of this kind it is mistaken action, error in judgment, or reckless conduct of soldiers for which a government in a given case has been held responsible. The international precedents reveal the application of principles as to the very strict accountability for mistaken action."

Of course, under the precedents referred to in the previous Part, the rule that a State bears responsibility for the acts of its armed forces is even stronger when there are officers present. Here, Captain Rogers was not only present, he gave the order to fire. Thus, it makes no difference whether other crew members passed on wrong information: the United States would be liable for the destruction of IR 655 even if it resulted from mistaken actions.

4.57 The acts of the United States also constituted violations of Article 1 of the Montreal Convention. A breach of Article 1 depends first on whether the act of destroying the aircraft was intentional or accidental, and second on whether it was lawful or unlawful. In this case, there is no doubt that the shooting down of the plane was intentional and unlawful. This is so even if the plane was believed to be an F-14. Since the only conceivable justification for shooting down an F-14 would be in self-defence, it is to that question that this analysis now turns.

2. The "Self-Defence" Argument

4.58 The governing rule is clear: under international law the use of armed force is prima facie unlawful. The only exception to this rule is where the State using force acts in self-defence. The United States has repeatedly claimed that the USS Vincennes acted in this manner in shooting down IR 655[1]. In addition, the ICAO Report's reference to the United States' alleged misperception that IR 655 was a military aircraft with hostile intent, and the ICAO Council's failure to condemn the United States for its acts, implicitly gives credence to this argument.

4.59 As explained in Part III, in order for the United States' invocation of self-defence to be legally valid, the Vincennes must have been subject to an armed attack when it fired. However, the facts show the contrary: not only was IR 655 not hostile, it had no capability to mount an armed attack. Indeed, even if IR 655 had been an F-14, it still would have been unlawful to shoot the plane down since it would have been operating legitimately within its own airspace. Even had the Vincennes been subject to interception by Iranian coastguard or had been warned out of

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[1] See, para. 3.88, above.

Iranian waters, it would have had no right to take defensive measures involving the use of force in a situation where it and other U.S. warships had unlawfully intruded into, and were hovering in, the Islamic Republic's territorial waters.

4.60 The only question that remains therefore is whether the United States not only misidentified the plane as an F-14, but also reasonably believed that it was about to be attacked by that F-14. Here again there is no factual basis for a belief that any United States warship was about to be attacked. The Airbus was behaving normally for a commercial flight; it was ascending at a speed far slower than a fighter plane would descend in a dive attack; and it was operating in the regular commercial air corridor. Thus, even if the plane had been identified as an F-14, it had not in any way adopted an attack profile. Moreover, there was no precedent for attacks on U.S. warships by Iranian military aircraft and, in any event, an F-14 would never be used to attack a ship[1].

4.61 It is significant that both the Sides and the Vincennes illuminated the plane, but that IR 655 took no defensive measures and did not illuminate any of the U.S. warships in return - an act which would have been necessary if the plane had been preparing for a missile attack of the kind mounted against the Stark. The lack of either offensive tactics (illumination) or defensive measures (evasion) by IR 655 provided further evidence that the plane had no hostile intent. Consequently, both the Sides and the Montgomery dismissed the plane as a commercial flight. All these facts were known to the Commanding Officer of the Vincennes; yet he still made the decision to fire.

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[1] See, paras. 1.103-1.109, above.

4.62 It is further necessary to recall that under the NOTAM that had been issued by the United States, aircraft approaching a U.S. warship were only supposed to be at risk of "defensive measures" if they had not been cleared from a regional airport and if they came within 5 nautical miles of a warship at an altitude of less than 2000 feet. In this case, the interception of IR 655 took place at a distance of 10 nautical miles from the Vincennes and at a height of 12,950 feet. Not only was this outside the lateral and vertical limits appearing in the NOTAM, but IR 655 was also a flight "cleared" to depart from a regional airport to which the NOTAM purported not to apply. Thus, under the United States' own NOTAM, there was no justification to attack.

4.63 Even if the provisions of the NOTAM had been followed, the ICAO Report itself has recognized that its terms were so ambiguous as to be effectively useless. It stated:

> "The full implications of the rules of engagement of the United States warships were not sufficiently reflected in the notice promulgated by the United States. It was not specified what was considered to be 'operating in a threatening manner', what distance was considered 'well clear of United States warships', and what was meant with 'could place the aircraft at risk by United States defensive measures'. The safety risks imposed by the presence of naval forces in the Gulf area to civil aviation may have been underestimated, in particular as civil aircraft operated on promulgated tracks including standard approach and departure routes from airports in the area[1]."

Thus even if the procedures set out in the NOTAM had been followed, they would not have helped IR 655 or other civilian traffic to realize that they were in danger. The provisions of the NOTAM were simply too vague.

4.64 The only remaining allegation that needs to be dealt with is the claim that the Vincennes was under attack from Iranian patrol boats and believed IR 655 to be part of this attack. This theory, based entirely on the Defense Department Report, has been discussed in Part I as the "coordinated attack" theory. It was shown there to have no basis in fact.

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[1] ICAO Report, para. 2.2.5.

4.65 What is known is that the Vincennes' helicopter intruded into the airspace over the Islamic Republic's internal waters some two hours before the IR 655 incident and was warned off by coastal patrol boats[1]. After this incident, which the Commander of the Sides clearly viewed as a provocation by the helicopter, the Vincennes, which was already in the territorial sea of the Islamic Republic, manoeuvred to attack the boats. It was this unlawful intrusion into the Islamic Republic's territorial sea that resulted in the Vincennes being positioned directly under the flight path of IR 655. This in itself was an illegal act in that U.S. warships only had at most the right of innocent passage through the Islamic Republic's territorial waters, and only if the prior authorization of the Islamic Republic had been obtained. More importantly, however, the theory that the warships were under a coordinated attack has been shown to be absurd. Indeed, the Commanding Officer of the Sides, who was directly involved in the incident and the person best placed to judge it, publicly ridiculed the idea that a few small boats would attack some of the U.S. Navy's most powerful ships after this had been advanced by U.S. spokesmen[2].

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[1] As pointed out above, no requests for assistance were received by the Vincennes before it decided to despatch the helicopter.

[2] See, para. 1.115, above.

3. U.S. Attitudes In Related Incidents

4.66 It is thus quite impossible on any legal grounds to excuse the United States' use of force in this incident. The United States should be condemned and should be ordered to make reparations for its acts. In the past, no State has argued this principle more strongly than the United States itself. In particular, the United States has steadfastly condemned the shooting down of aircraft, whether civil or military, by the armed forces of another State. For the United States to adopt an entirely different stance now with respect to the shooting down of flight IR 655 is unacceptable. While it is not necessary to recanvass all of the previous aerial incidents on which the United States has expressed a position - many of these are quite well known - it is appropriate to focus on a few examples that involved civilian aircraft so as to illustrate the degree to which the United States has altered its stance for purposes of this case.

4.67 One such incident, following the Second World War, involved a French commercial airliner on a flight from Frankfurt to Berlin. On 29 April 1952, this flight was fired on by a Soviet fighter. Although the pilot managed to land the plane safely, passengers were wounded. In response, the Allied High Commissioners in Germany (who included an American representative) made a joint protest in which they stated:

> "Quite apart from these questions of fact (whether the aircraft was outside the corridor), to fire in any circumstances even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible and contrary to all standards of civilized behavior[1]."

4.68 On 23 July 1954, a Cathay Pacific flight from Bangkok to Hong Kong was shot down by fighters of the People's Republic of China. Numerous passengers were either killed by the attack or drowned after the aircraft crashed south of Hainan Island. Again, the reaction from the United States was one of condemnation under what were said to be "universally recognized principles of international law[2]". It was claimed at the time that the plane had been fired on by accident because it was mistaken for a hostile aircraft[3]. This was not accepted by the United States, who referred to the incident as an "act of barbarity". In any event, the Chinese government did not regard its mistaken identification as relieving it of responsibility for the act and paid compensation to the U.K. government on behalf of all the victims regardless of nationality.

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[1] Cited in O. Lissitsyn, op. cit., at p. 574; see, also, Lowenfeld, "Agora, Iran Air Flight 655: Looking Back and Looking Ahead", 83 A.J.I.L. (1989), pp. 338-339.

[2] Lowenfeld, op. cit., p. 339.

[3] Hughes, op. cit., p. 602.

4.69 On 27 July 1955, an El Al airliner was shot down by Bulgarian forces while flying from Vienna to Tel Aviv. All 58 passengers and crew were killed. Once again, the United States declared that the attack was "a grave violation of accepted principles of international law[1]".

4.70 The incident involving Israel's illegal downing of a Libyan civilian aircraft in 1973 has been referred to above[2]. The ICAO Resolution condemning this act as a flagrant violation of the Chicago Convention was supported by 28 States of the 30-member Council. Lastly, the reaction of the United States to the downing of Korean Airlines flight 007 in 1983 was summed up by President Reagan in referring to the incident as the "Korean Air Line massacre[3]". A few days later, he signed into law Public Law 58-58 of 15 September 1983 condemning the Soviet Union for this act. Moreover, the United States' Representative before ICAO pressed for condemnation of the incident, and the United States implemented sanctions against the Soviet Union in response.

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[1] Lowenfeld, op. cit., p. 339.

[2] See, paras. 3.17-3.18, above.

[3] A transcript of President Reagan's speech is set out in the New York Times, 6 September 1983, a copy of which is attached at Exhibit 63.

4.71 In this case, the gravity of the incident is greatly heightened by the fact that the Vincennes had unlawfully intruded into the Islamic Republic's territorial waters and that IR 655 was flying within the Islamic Republic's airspace over which the Islamic Republic exercised exclusive sovereignty. The fact that there was a Treaty of Amity applicable between the two States makes the act even more serious since it constitutes a violation of the whole purpose of the Treaty, as well as of its specific provisions regarding the treatment of nationals and the freedom of commerce and navigation. It was also repugnant that the U.S. warships did not attempt to assist in any rescue operations after the crash of IR 655.

4. The United States' Failure To Accept Responsiblity for Its Actions in this Incident and To Guarantee the Prevention of Similar Incidents in the Future

4.72 The United States refused to accept liability for the destruction of IR 655, and failed to offer any compensation to the Islamic Republic until two months after the Application was filed in this case, and then in a highly questionable form. It has also failed to take steps to guarantee the non-repetition of such an incident. The offer then made took the form of an ex gratia payment to be made to some intermediary but not to the Islamic Republic. The amount offered was totally inadequate, as will be discussed in the next Part. This response of the United States to its deliberate act of shooting down the aircraft is itself a breach of the Montreal Convention.

4.73 As discussed in Part III above[1], Articles 3 and 10(1) of the Montreal Convention impose certain duties on State Parties thereto. Article 3 requires a State to make offences under Article 1 punishable by severe penalties. As pointed out in paragraph 3.59, instead of doing that, the United States awarded the Commanding Officer of the Vincennes one of its highest peace-time honours[2]. Such a gesture could only be considered an insult to the innocent victims and their surviving dependents.

4.74 Had the United States assumed liability and paid appropriate compensation, the failure to impose severe penalties on the individuals involved would have become academic, since the United States itself would have admitted responsibility and paid the requisite penalty. But its present stance is in clear violation of Article 3. An offer to make an inadequate ex gratia payment does not remedy this breach of the Montreal Convention; and the honouring of the naval officer most directly responsible was publicly to scoff at that Convention.

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[1] See, paras. 3.60-3.61, above.

[2] See, Exhibit 64.

4.75 After the Stark incident, the United States made a formal demand on Iraq in a State Department note of 20 May 1987[1] asserting that -

- Iraq was at fault;
- The Iraqi pilot "knew or should have known" that the Stark was a U.S. ship;
- Iraq should prosecute the pilot concerned;
- Iraq should pay full compensation for the injuries sustained;
- A joint enquiry should be undertaken to avoid similar incidents in the future and to determine appropriate disciplinary action against the responsible Iraqi personnel.

It is impossible to justify the conduct of the United States in the present case in the light of the position it took in reponse to the Stark attack. International law does not allow a State to "blow hot and cold" in this manner, and the standards the United States sought to enforce on Iraq in the Stark incident should now, as a minimum, be imposed on the United States in this case.

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[1] See, para. 5.37, below and Exhibit 62.

4.76 The United States has also failed to take steps to prevent the repetition of such an incident. In particular, it has continued to operate under the provisions of its illegal NOTAM (although it purported to cancel the NOTAM), it has continued to endanger civil aviation, and it has failed to take proper steps to ensure the activities of its fleet comply with the safety provisions set out in the Chicago Convention and its Annexes. The NOTAMs and the movements of the U.S. warships continue to violate the Islamic Republic's sovereignty as well as rules governing the right of innocent passage. Such actions also constitute a continuing violation of the Treaty of Amity both by virtue of the U.S. trade embargo and of the U.S. fleet's continuing interference with the Islamic Republic's freedom of commerce and freedom of navigation.

C. Conclusion

4.77 The failure of the ICAO Council to condemn strongly the United States for shooting down IR 655, together with the Unites States' violations of basic standards of air safety, is unacceptable. It is also unacceptable that such an international organization should apply an appropriately strict standard to the conduct of certain States - as was the case when the ICAO Council condemned earlier aircraft incidents - and yet avoid facing up to clear violations of international law by the United States in the present case. The principle of the equality of States does not allow an organ of the United Nations to treat major powers in one way and other States quite differently, categorically condemning the transgressions of the latter but only "deploring" those of the former.

4.78 When all is said and done, it is apparent that the manner of operations of the U.S. fleet in the Persian Gulf (which continue to this day), the action of the United States in shooting down IR 655, and its response to this criminal act, all involve violations of international law of the most serious kind.

PART V

REPARATION

5.01 The Islamic Republic has demonstrated in previous Parts that in shooting down IR 655 the United States violated its obligations under the Chicago and the Montreal Conventions, the Treaty of Amity and related provisions of customary international law. From these violations of international law flows the obligation of the United States to make reparation for its unlawful actions. The Permanent Court of International Justice stated this fundamental principle in its judgment in the case concerning the Factory at Chorzow:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is an indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself[1]."

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[1] Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21. In the United States Diplomatic and Consular Staff in Tehran case, having found that the Islamic Republic had breached its responsibilities to the United States, the Court stated as follows:

> "As to the consequences of this finding, it clearly entails an obligation ... to make reparation for the injury thereby caused."

Judgment, I.C.J. Reports 1980, pp. 41-42, para. 90.

5.02 The Islamic Republic seeks three kinds of reparation for the violations by the United States of its international obligations. First, it seeks declaratory relief, and accordingly it calls upon the Court to adjudge and declare that the United States has violated its obligations under international law. Second, it submits that the Court should decide that the United States is under an obligation to cease and refrain from all such conduct as may constitute breaches of such obligations. Third, it seeks reparation for the damages caused by the United States in shooting down IR 655, in a form and an amount to be determined by the Court. These three requests for reparation are discussed in turn below.

A. Request for a Declaration that the United States Violated the Chicago Convention, the Montreal Convention, the Treaty of Amity and Related Principles of Customary International Law

5.03 With respect to the Chicago Convention, the preceding discussion has shown that the decision of the ICAO Council was erroneous[1]. In applying and interpreting the principles upheld in the Convention, the Council should have found that the United States had committed fundamental violations of the principles embodied in the Chicago

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[1] See, in particular, para. 2.36, above.

Convention and condemned the United States for its actions[1]. The Council also should have called upon the United States to make appropriate reparation for its wrongful acts[2]. It is the failure to take these actions which, inter alia, is the subject of this appeal. With respect to the Montreal Convention and the Treaty of Amity, the Islamic Republic has also shown that the United States has violated Articles 1, 3 and 10(1) of the former as well as the Preamble and Articles IV(1) and X(1) of the latter.

5.04 The Court has the competence to judge on the interpretation and application of these Conventions pursuant to Article 84 of the Chicago Convention and Article 14 of the Montreal Convention, respectively. It has the same authority to rule on disputes relating to the interpretation or application of the Treaty of Amity under Article XXI(2) of that Treaty. Once seized of a dispute pursuant to those Articles, there is no doubt that like any other international tribunal the Court has the power to grant declaratory relief of the kind requested.

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[1] As noted above, the ICAO Council strongly condemned Israel's shooting down of a Libyan civil aircraft and the Soviet Union's destruction of KAL 007. See, paras. 2.37-2.39, above.

[2] See, para. 5.14, below. The Council has a duty not only to uphold the principles of the Chicago Convention but also under Article 44(f) to protect the rights of the States which are parties to the Convention.

5.05 This general principle has most recently been expressed by the Tribunal in the Case of New Zealand against France (Chairman, Jiménez de Aréchega), in the last stage of the Rainbow Warrior affair. It noted that there exists -

> "... une habitude de longue date des Etats et des Cours et Tribunaux internationaux d'utiliser la satisfaction en tant que remède ou forme de réparation (au sens large du terme) pour les violations d'une obligation internationale[1]."

In considering its own power to grant declaratory relief by making a statement to the effect that France had acted illegally, the Tribunal concluded as follows:

> "Il est indubitable que ce pouvoir existe et qu'il est considéré comme une importante sanction[2]."

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[1] Award of 30 April 1990, pp. 115-116, para. 122. Unofficial translation:

> "... a longstanding practice of States and of international Courts and Tribunals to use 'satisfaction' as a remedy or form of reparation (in the wide sense of the term) for violations of an international obligation."

This practice is discussed in detail by Professor Arangio-Ruiz in his Second Report to the International Law Commission (1989) (A/CN.4/425).

[2] Ibid., p. 116, para. 123. Unofficial translation:

> "It is beyond doubt that this power exists and that it is considered to be an important sanction."

The Tribunal went on in that case to condemn France for the violation of its international obligations to New Zealand.

5.06 With respect to the practice of the International Court, it has exercised the powers to make declarations of this kind on a number of occasions. In Chorzow Factory, for example, the Permanent Court stated that the purpose of a declaratory judgment was-

> "... to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position then established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned[1]."

And in the Corfu Channel case, having determined that the British navy had acted illegally, the Court declared that "the United Kingdom violated the sovereignty of the People's Republic of Albania[2]".

5.07 In this case, it is essential that the full legal responsibility of the United States for its acts in this incident be recognized. This is a prerequisite of the claims for monetary and other forms of reparation discussed below. Thus, in the dispositif of its Judgment on the Merits in the Nicaragua case, the Court first enumerated the United States' violations of international law and then in paragraphs (12) and (13) called on the United States to cease such actions and to make reparation for the injury it had caused[1].

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[1] Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 20.

[2] Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 36 (dispositif).

5.08 Accordingly, the Islamic Republic calls upon the Court to exercise its power to grant declaratory relief and to declare that the United States has violated its international obligations under the Chicago Convention, the Montreal Convention, the Treaty of Amity and related principles of customary international law.

B. Request for an Order that the United States Cease and Refrain from Its Violations of International Law

5.09 It has been shown above that the United States continues to endanger civil aviation in the Persian Gulf in violation of the Chicago Convention as well as to fail to observe and abide by the principles of free commerce and navigation enshrined in the Treaty of Amity. The activities of the U.S. fleet in the Persian Gulf also constitute a continuing abuse of the territorial sovereignty of the Islamic Republic and of the principle of non-intervention in breach of Articles 1 and 2 of the Chicago Convention, as well as an interference in the Islamic Republic's internal affairs, while the continuing trade embargo on the Islamic Republic is in violation of the principles enshrined in the Treaty of Amity.

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[1] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 146-148, para. 292 (dispositif).

5.10 In the light of these continuing violations of international law, the Court should use its powers to order the United States to cease and refrain from all actions in violation of international law which endanger civil aviation as well as all actions in violation of the Treaty of Amity. In the _United States Diplomatic and Consular Staff in Tehran_ case the Court ordered the Islamic Republic immediately to "take all steps to redress the situation resulting from the events of 4 November 1979 ...[1]". Similarly, in the _Nicaragua_ case where the Court adjudged that the breaches of international law by the United States were still continuing, the Court decided that the United States was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations...[2]".

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[1] _United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980_, p. 44, para. 95 (_dispositif_).

[2] _Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986_, p. 149, para. 292 (_dispositif_).

5.11 It is a generally accepted principle that States must not only make reparation for their breaches of international law but must take steps to cease and refrain from committing such breaches. After the KAL 007 incident, the United States was the first to call upon the international community in general and the Soviet Union in particular to take steps to prevent the repetition of such an incident. It sponsored the adoption of Article 3 bis of the Chicago Convention, and it concluded a bilateral agreement with the Soviet Union to set up procedures for emergency landings in restricted areas of the Soviet Union[1]. In Public Law 58-58, enacted after the incident, the United States called on the Soviet Union to "agree to abide by internationally recognized and established procedures which are purposefully designed to prevent the occurrence of such tragedies[2]". For purposes of safety as well as to prevent continuing violations of international law, the Islamic Republic submits that the United States should be ordered to cease and desist from all acts in the region which endanger civil aviation and which are in violation of international law.

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[1] Sochor, op. cit., p. 163.

[2] See, Exhibit 57.

C. Request for an Award of Compensation against the United States for Its Violation of International Obligations

1. The Court's Power To Award Monetary Reparation

5.12 As noted above, the Permanent Court held in the Chorzow Factory case that reparation must be made for breach of an international obligation. In the Chorzow Factory case, where the Court's jurisdiction derived from a Convention between Poland and Germany under which any dispute concerning the interpretation or application of the Convention was to be resolved by the Court, the Court considered itself empowered by this provision to make a monetary award[1]. In the New Zealand v. France case, where exactly the same wording (granting power to the Tribunal to resolve any dispute submitted to it concerning the interpretation or application of the Accord) was the basis of its competence, the Tribunal relied on the Chorzow Judgment in finding that it had power to make a monetary award. It stated:

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[1] In the United States Diplomatic and Consular Staff in Tehran case, which involved in part a violation of the same Treaty of Amity in question here, the Court held that the Islamic Republic was "under an obligation to make reparation ... for the injury caused ...". Judgment, I.C.J. Reports 1980, p. 45, para. 95 (dispositif). Judge Lachs, in his Separate Opinion in that case, stated that in his view this paragraph of the dispositif was redundant as the obligation to make reparation flowed automatically from the finding that the Islamic Republic was responsible for the injury. Ibid., p. 47. In the Nicaragua case, which also involved a treaty with almost identical wording to that in question here, the Court decided that the United States was under an obligation to make reparation to Nicaragua. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 149, para. 292 (dispositif).

> "Le Tribunal considère qu'il est habilité à rendre un jugement de compensation monétaire pour violation de l'Accord de 1986, la résolution de 'tout conflit concernant l'interprétation ou l'application' des dispositions de cet Accord relevant de sa compétence (affaire de l'usine Chorzow (Juridiction) PCIJ Pubs. Série A., No. 9, p. 21)[1]."

5.13 Virtually the same wording as that on which the Court based its jurisdiction in the Chorzow Factory case is found in the Chicago Convention, the Montreal Convention and the Treaty of Amity. Accordingly, the Islamic Republic submits that the Court clearly has the power to award monetary and other forms of reparation for the breaches by the United States of its obligations under international law and requests the Court to exercise its competence in this respect. As the Court held in the Nicaragua case:

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[1] Award of 30 April 1990, p. 114, para. 117. Unofficial translation:

> "The Tribunal considers that it is empowered to make an award of monetary compensation for violation of the 1986 Agreement, since the resolution of 'any dispute concerning the interpretation or application' of the provisions of this Agreement falls within its jurisdiction (Case concerning the Factory at Chorzow (Jurisdiction) P.C.I.J., Series A, No. 9, p. 21)."

> "In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation[1]."

5.14 Insofar as the Islamic Republic's submissions constitute an appeal from the decision of the ICAO Council, it is significant that the Council has previously found itself to be empowered to call on States to make reparation for their illegal acts. This is clear from the Council's action in the KAL 007 incident. Having recognized the responsibility of the Soviet Union for destroying KAL 007, the Council's Resolution stated as follows:

> "... such use of armed force ... is incompatible with the norms governing international behavior ... and invokes generally recognized legal consequences ...[2]."

The generally recognized legal consequences were the making of reparation.

5.15 Even the ICAO Assembly has implied that it has such powers. Having condemned Israel for its actions in intercepting a Lebanese civil aircraft chartered by Iraqi

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[1] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 142, para. 283.

[2] See, Exhibit 55 (emphasis added).

Airways over Lebanese territory in 1973, the Assembly called on Israel to desist from acts of "unlawful interference" and warned that if Israel continued "committing such acts the Assembly will take further measures against Israel to protect international civil aviation[1]". Although the nature of the reparation to be made in the event of a breach of provisions of the Convention is not specified in either the Chicago or the Montreal Conventions, this does not affect the Court's power. As held in Chorzow Factory, already cited above-

> "Reparation ... is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself[2]."

2. The Basis for the Request for Reparation

5.16 The Islamic Republic has shown that the action of the United States was unlawful. Moreover, the United States has recognized that "indemnification is required where the exercise of armed force is unlawful[3]". In such circumstances, the standard of compensation has been set out in the Judgment in Chorzow Factory, Merits in the following way:

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[1] Actions of the Council, 80th Session, August-December 1973, ICAO Doc. 9098 C/1017, pp. 56-58.

[2] Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 8, p. 21.

[3] See, the Statement of Abraham R. Sofaer, the former U.S. Agent in this case, on 4 August 1988. House Hearings, p. 49. See, Exhibit 10.

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law[1]."

5.17 While this standard represents reparation for unlawful expropriation under international law, it is important to recall that the Islamic Republic submits that the shooting down of IR 655 was not only unlawful but that it was such a flagrant and extreme violation of international law that it has the character of an international crime. Article 19 of the draft Articles on State Responsibility adopted by the International Law Commission in 1976 recognizes the existence of crimes by States in international law. Article 19(2) reads as follows:

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[1] Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.

> "2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime[1]."

5.18 Under the basic principles of humanity upheld by the international community, the shooting down of a civilian plane represents one of the most heinous crimes for which a State could be responsible. No State has more strongly upheld this view in the past than the United States, as has been seen above in connection with its reaction to the KAL 007 and other incidents.

5.19 In such circumstances, the Islamic Republic submits that the very highest form of compensation must be awarded not only to compensate the victims and to make reparation for the harm done to Iran Air and the Islamic Republic, but also to demonstrate the disapprobation of the international community for acts which are so anathema to basic rules of international law and norms of behaviour. In the new "kinder and gentler" world community that the United States has been espousing such acts deserve even greater sanction.

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[1] Yearbook of the International Law Commission (1980), Vol. II, pp. 30-34.

5.20 Moreover, the United States would be responsible to make reparation to the Islamic Republic whatever the circumstances of the shooting down of IR 655. A State is responsible even for its mistakes. Referring specifically to IR 655, Professor Lowenfeld notes that "the liability of a state for shooting down a plane does not depend on negligence", and concludes that the correct legal position is that there is "liability regardless of fault, so long as the cause is established, as it clearly was in the case of Iran Air 655[1]". Thus, even in finding, albeit erroneously, that IR 655 was shot down by accident, the ICAO Council should have recognized the responsibility of the United States for this act and called upon the United States to make appropriate reparation.

3. The Reparation Requested

5.21 The Islamic Republic sets forth below the specific elements of reparation requested:

1. Compensation for the killing of the 290 persons on board IR 655, including but not limited to compensation for the value of

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[1] Lowenfeld, op. cit., p. 338.

the life lost, the loss to the estate of the deceased, and compensation for loss of contributions and personal services, for mental suffering, grief and shock, and for loss of personal belongings.

2. Compensation for the loss to Iran Air of the Airbus A-300 and the property on board.

3. Compensation to the Islamic Republic for the injury to its legal interest, its honour and its dignity, caused by the violation of the Islamic Republic's territorial sovereignty, the attack on IR 655 itself, and the attitude of the United States in alleging the Islamic Republic's fault and in refusing to accept full responsibility for its unlawful act.

4. Punitive or exemplary damages because of the criminal nature of the act.

5. Compensation for the loss to Iran Air of 16 experienced and trained crew members.

6. Compensation for the disruption to Iran Air services.

7. All expenses and other costs of the Islamic Republic, Iran Air, and others, including the relatives of the victims, arising from, *inter alia*, all search and rescue and other investigative operations carried out by the Islamic Republic in connection with the destruction of IR 655.

8. Any and all other relief that the Court may deem appropriate.

5.22 Each of these heads of damage is discussed briefly below. What this discussion shows is that in similar circumstances international courts and tribunals have consistently granted reparation of the kind requested. The Islamic Republic reserves the right to amend these heads of damage and to provide detailed quantification of each head at such time and in such manner as the Court may deem appropriate[1].

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[1] The Islamic Republic notes that this practice has been followed in several cases including the *Chorzow Factory*, *Corfu Channel*, and *Nicaragua* cases.

5.23 Under Item 1 above, the Islamic Republic seeks compensation for the killing of the 290 persons on board IR 655. This includes not only an amount representing the value of the life lost, but also the damages resulting to the survivors from the death, in terms of the loss of contributions or personal services rendered to family and relatives by the deceased, and the mental suffering, grief and shock caused to such survivors by the incident and the loss of their loved ones together with an amount to satisfy any obligations of the deceased.

5.24 The case involving by far the most numerous claims arising out of deaths related to the sinking of the Lusitania. These claims were settled by the United States-German Mixed Claims Commission, established under an agreement of 10 August 1922. The formula derived by the Commission was to allow amounts -

> "(a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death[1]."

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[1] Cited in M. Whiteman, Damages in International Law Vol. 1, p. 682. Detailed factors to be considered under this formula were also set out by the Commission and are reprinted by Whiteman.

5.25 While such factors are clearly relevant in this case, the Islamic Republic submits that the fact that a victim had no dependents does not mean that no reparation should be paid. The assets of the individual would ultimately have gone either to the closest relative, or if there were no claims, to the State itself. Accordingly, reparation should be made for the entire loss. Recognition of the inequity of any other method has been given in international practice. In the Mixed Claims Commission cases, the German Commissioner (Kiesselbach) noted that Britain "*measured* the damage caused ... by examining a 'considerable number of cases' on lines substantially the same as established by this Commission ... and that by thus reaching an average amount they valued the life of each civilian national on that basis *regardless* of whether the deceased left surviving dependents or not[1]".

5.26 The Islamic Republic also submits that an amount of compensation should be awarded for the value of the life lost. Again, this principle has been recognized in international law. For example, in a claim made on behalf of the heirs of Maurice Langdon before the General Claims Commission between the United States and Panama, although finding that the deceased did not in any way financially support the claimants, the Commission deemed that there was a minimum of "reparation due by one State to another on account of its responsibility for the death of the latter's citizen[1]". Such amount should be awarded irrespective of income, dependents, age or status, but in recognition of the loss to the State resulting from the killing of one of its citizens.

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[1] Cited in Hackworth, *Digest of International Law* (1943) Vol. 5, p. 748 (emphasis in original).

5.27 The Islamic Republic also submits that under international law the compensation for mental suffering, grief and shock of relatives should be calculated "without regard to the victims' financial situation[2]". The Islamic Republic notes in this context that in 1968 Israel paid to the United States sums ranging from $10,000 to $25,000 (present value approximately equivalent to $35,000 to $85,000) for mental anguish alone arising out of the deaths caused by the Israeli attack on the USS Liberty[3]. In the Stark case, the United States acknowledged that there was no objective way to evaluate amounts for mental shock and therefore set standard amounts for these losses. In a number of instances amounts in excess of $800,000 were paid by Iraq under this head alone.

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[1] See, Coussirat-Coustère and Eisemann, op. cit., at p. 519.

[2] Such a principle is enshrined in a 1975 Resolution of the Committee of Ministers of the Council of Europe. See, Article 12 of Resolution (75)7 "Relative à la Réparation des Dommages en Cas de Lésions Corporelles et de Décès", Résolutions et Recommandations du Comité des Ministres dans les Domaines des Droits Civil, Commercial, Public et International, Vol. 1, 1964-1982 (Strasbourg, 1983).

[3] House Hearings, p. 64. See, Exhibit 10.

5.28 With regard to the loss of the aircraft (Item 2), the governing principles are set out in the Chorzow Factory case[1]. In order to put the Islamic Republic in the same position as it would have been if the aircraft had not been shot down, it should be compensated on behalf of Iran Air for the loss of the Airbus A-300. Although Chorzow Factory involved an unlawful expropriation, this had the same effect as if the factory had been destroyed. Moreover, the same principles were upheld in the Corfu Channel case where the Court ordered compensation to the United Kingdom for the "destruction" of the destroyer "Saumarez"[2].

5.29 In the light of the above principles, the Islamic Republic requests a replacement Airbus. Under the present trade embargo imposed by the United States in violation of the Treaty of Amity[3], the Islamic Republic has been unable to buy another Airbus, or virtually any other kind of civil aircraft which uses U.S. parts or technology, and which is suitable for Iran Air's commercial fleet and crew[1]. In such circumstances, monetary compensation will not cure the loss suffered, and the Islamic Republic must therefore receive a replacement aircraft as restitution.

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[1] See, para. 5.16, above.

[2] Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 249.

[3] In the Nicaragua case, the Court held that the United States trade embargo was a violation of a similar treaty. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.148, para. 292, subpara. (11) (dispositif).

5.30 Item 3 concerns the injury to the Islamic Republic itself by the action of the United States. Such a ground for compensation has a long tradition in international law and a number of States have sought recovery on such a basis. For example, in the *Carthage* and *Manouba* cases heard by the Permanent Court of Arbitration in 1913, France requested 100,000 francs for the "préjudice moral et politique résultant de l'inobservation du droit commun international et des conventions réciproquement obligatoires pour l'Italie comme pour la France[2]". Similarly, in the *Aerial Incident of 27 July 1955* case, the United States asked in its Memorial to be awarded $100,000 on essentially the same basis[3].

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[1] Copies of the relevant trade embargo regulations are attached at *Exhibit 65*.

[2] *See*, 11 *R.I.A.A.* (1913) pp. 460-461, *cited in* Coussirat-Coustère and Eisemann, *op*. *cit*., p. 332. Unofficial translation:

> "...moral and political prejudice arising from the non-observance of general international law and of conventions mutually binding on Italy and France..".

[3] *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 253.

5.31 Most recently, in the New Zealand v. France case the Tribunal recommended the payment of a sum of $EU 2 million by France into a fund to promote good relations between the two States[1]. This recommendation arose from the finding that France had violated its obligations to New Zealand, and did not represent compensation for any material damage. The award also noted that the 1986 Agreement between the two States, endorsed by the United Nations Secretary General and requiring payment of $7 million by France, represented a "réparation non seulement du dommage matériel ... mais également du préjudice immatériel subi, indépendamment de ce dommage matériel[2]".

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[1] Award of 30 April 1990, pp. 118-119, paras. 124-128. The terms of reference empowered the Tribunal only to make recommendations in this area.

[2] Ibid., pp. 113-114, para. 115. Unofficial translation:

> "Compensation not only for material loss ... but also for non-material damage suffered, independently of this material loss."

Some measure of the insult felt by New Zealand can be seen from the New Zealand High Court's Judgment against the French agents who had blown up the Rainbow Warrior. It noted that the offences were "terrorist acts" although committed by French officers acting under orders. It was "all the more reprehensible that the operation should have been carried out by agents of a foreign State on the territory of an ally". It also noted that the Court's sentences should serve as a "deterrent" and "should reflect the sense of public outrage and condemnation of the type of offences committed". R. v Mafart and Prieur, New Zealand, High Court, Auckland Registry, 22 November 1985 (Davison C.J.), reprinted in 74 I.L.R. (1987) 242.

5.32 The kinds of non-material losses for which New Zealand had been seeking compensation are very similar to those for which compensation is requested here. In its Memorandum to the Secretary General, New Zealand declared that it was entitled to "a compensation for the violation of sovereignty and the affront and insult that was involved[1]".

5.33 Under Item 4, the Islamic Republic claims punitive damages against the United States for the criminal nature of its act. Although in some cases tribunals have been reluctant to make awards of punitive damages, where the circumstances have so demanded such awards have been made. For example, in the I'm Alone case - which arose from the United States' action in destroying a Canadian vessel - the Commissioners came to the following conclusion in 1935:

> "The Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologise ... therefor, and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 ...[2]."

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[1] 74 I.L.R. (1987) 241 at 259. A number of older cases are cited by Whiteman where compensation has been paid for injury to a State's honour and dignity. See, Whiteman, op. cit., p. 80, et seq., and fn. 186 thereto.

[2] Cited in Whiteman, op. cit., p. 154.

Moreover, in the Janes case (U.S.A. v. United Mexican States), the Commission noted "that the various degrees of improper governmental action would be taken into account in determining the amount of damages[1]". The Islamic Republic submits that in the light of the special circumstances of this case and as a recognition of the sanction placed on the United States' criminal action, a similar award should be made by the Court here.

5.34 With regard to the related losses of Iran Air (Items 5 and 6 above) the Islamic Republic should also be compensated for the loss of 16 experienced crew members and for the losses caused by the disruption to Iran Air's services. With regard to such consequential damages the Court acknowledged that these formed part of the reparation due in the Nicaragua case, stating that -

> "...Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce[2]."

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[1] See, Feller, The Mexican Claims Commissions 1923-1934, 1971 (Kraus reprint), p. 295.

[2] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 139, para. 278.

5.35 The final head of damages (Item 7) is for expenses arising out of the destruction of IR 655. Whiteman summarises such expenses as follows, noting that all are recoverable:

> "(1) those expenses incurred by the decedent prior to his death, and those incurred on account of his death and paid from the estate; (2) those expenses incurred by the individual claimant incidental to the presentation and development of the claim; and (3) those expenses incurred by the claimant government in the settlement of the claim[1]."

D. Conclusions: State Practice

5.36 There is an extensive amount of State practice on the reparation made in cases of wrongful death and destruction of property[2]. After the Israeli attack on the USS Liberty in 1967 which resulted in substantial damage to property and the death of 34 crew members, compensation between $325,000 and $1,075,000 in present dollars was paid to the United States on behalf of the relatives of the victims. Israel also paid for the damage to the vessel.

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[1] Whiteman, op. cit., p. 791.

[2] See, for a review of this State practice, George T. Yates III, "State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era" in International Law of State Responsibility for Injuries to Aliens, (1983) Lillich ed., p. 213.

5.37 Following the attack on the USS Stark in 1987, the United States sent Iraq a diplomatic note, extracts from which are set out below[1].

> "At the time of the attack, the U.S.S. Stark was flying the American flag and its identification was clearly indicated in large white numerals on its hull. The U.S.S. Stark twice notified the Iraqi aircraft that it was approaching a U.S. warship. The Government of Iraq is aware that U.S. vessels navigate in the area. In the circumstances, Iraqi personnel knew or should have known that the U.S.S. Stark was an American vessel. Moreover, they should have taken the steps necessary to identify it and to determine whether it was a legitimate military target.
>
> The attack by the Iraqi aircraft resulted in a tragic and needless loss of life, personal injury and property damage."

The same reasoning applies, *a fortiori*, in relation to the attack on IR 655. The note continued as follows, setting out the principles of reparation that the United States believed to be applicable in that case:

> "... the Secretary of State wishes to make clear that the United States Government expects the Government of Iraq to issue instructions necessary to ensure that United States personnel and property will not again be endangered by the wrongful actions of Iraqi military personnel, including disciplinary actions as appropriate ... The United States Government expects that the Government of Iraq will accept its liability in accordance with international law and provide

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[1] 53 AJIL (1989) 562. See, Exhibit 62.

> full compensation for the deaths, personal injuries, and the property damage sustained in this tragic event."

Iraq replied as follows:

> "The Iraqi Government, respectful of the requirements of international law ... agrees to give compensation for the unfortunate and unintentional accident which occurred ... Compensation is offered for the loss of life, personal injuries and material damages[1]."

5.38 Following this exchange, the U.S. State Department presented a bill to the Government of Iraq for $29.6 million, or $800,000 per person. Negotiations then ensued and a settlement was reached for $27,350,374, or approximately $740,000 per person. Iraq also agreed to pay compensation for the damage to the vessel.

5.39 The United States has clearly acknowledged that the same principles apply in the shooting down of a civilian aircraft. After the attack on KAL 007, the United States Representative in the Extraordinary Session of the ICAO Council called on the Soviet Union to "comply with the obligation under international law to make appropriate compensation[2]". In a Diplomatic Note submitted to the Soviet Union, the United States maintained that "the Soviet

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[1] See, Exhibit 62.

[2] A copy of this statement is attached at Exhibit 55.

Union's responsibility under international law for these actions and its concomitant obligation to make reparation are beyond dispute[1]".

5.40 It was not until two months after the filing of the Application in this case, almost a year after the incident, that the United States gave any indication of the amount of an offer of compensation to the victims. The sums offered are a fraction of the amount claimed by the United States in the Stark incident and paid by Iraq. The United States has offered to pay a maximum of $250,000 through an intermediary directly to the family of each full-time wage-earning victim, and $100,000 for each of all the other victims, which sums are to be divided between surviving spouse, children and parents of the victim[2]. In other words the sums offered are far less than the amounts received for mental suffering alone in the Stark incident[3]. The United States has made no offer to compensate other relatives or dependents of the victims, nor to compensate for the loss of the plane nor the infringement of the Islamic Republic's sovereignty, nor even to guarantee that such an action will not be repeated.

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[1] A copy of this Note is attached at Exhibit 56.

[2] Letter from the Embassy of Switzerland to the Ministry of Foreign Affairs of the Islamic Republic of Iran dated 12 July 1989. This letter is attached at Exhibit 66.

[3] See, para. 5.27, above.

5.41 The offer that has been made is on its face inequitable and inadequate and fails to acknowledge or take into account the United States' liability for shooting down IR 655. The principles of law discussed above define the standards that the Islamic Republic submits should be adopted in adjudging the reparation to be awarded in this case. Moreover, as a final insult, the United States refuses to make any payment directly to the Government of the Islamic Republic but insists that arrangements should be made to make payments for the victims. This is in contravention of the universally recognized principle that a State has the right to espouse such claims.

SUBMISSIONS

In the light of the facts and the arguments set out above, the Islamic Republic of Iran respectfully makes the following Submissions, which it reserves the right to modify, amplify or supplement at later stages of these proceedings.

May it please the Court, rejecting all contrary claims and submissions, to adjudge and declare, as follows:

First, the Court has jurisdiction to entertain the appeal from the decision of the ICAO Council presented in the Application and this Memorial pursuant to Article 84 of the Chicago Convention.

Second, the Court has jurisdiction to entertain the dispute set forth in the Application and this Memorial as it relates to the interpretation or application of the Montreal Convention, on the basis of Article 14(1) of the Montreal Convention.

Third, the Court has jurisdiction to entertain the dispute set forth in this Memorial as it relates to the interpretation or application of the Treaty of Amity, on the basis of Article XXI(2) of the Treaty of Amity.

Fourth, that the decision of the ICAO Council was erroneous and that the United States, in shooting down IR 655 on 3 July 1988 while it was flying within the Islamic Republic's airspace, violated fundamental principles of international law, including its legal obligations under:

- Articles 1, 2, 3 _bis_, 44(a) and 44(h) and Annexes 2, 11 and 15 of the Chicago Convention;
- Article 1 of the Montreal Convention;
- Articles IV(1) and X(1) of the Treaty of Amity; and
- Rules of general and customary international law relevant to the interpretation or application of the above Treaty provisions.

Fifth, the United States, in failing to make the offences mentioned in paragraph _fourth_ above punishable by severe penalties and in failing to take all practical measures for the purpose of preventing such offences, has violated its legal obligations under Articles 3 and 10(1) of the Montreal Convention.

Sixth, the United States, in committing the violations mentioned in paragraph _fourth_ above, has committed a crime under international law.

Seventh, the United States, in stationing its warships in the Persian Gulf within the Islamic Republic's internal waters and territorial sea and in the high seas, and in issuing and operating under the NOTAMs discussed herein, has interfered with and endangered civil aviation in violation of Articles 44(a) and 44(h) and Annexes 2, 11 and 15 of the Chicago Convention.

Eighth, the United States, in stationing its warships in the Persian Gulf within the Islamic Republic's internal waters and territorial sea and in the international waters, and in issuing and operating under the NOTAMs discussed herein, has violated its legal obligations to the Islamic Republic to guarantee freedom of commerce and navigation under Article X(1) of the Treaty of Amity.

Ninth, the United States, in stationing and operating its warships and their accompanying aircraft within the Islamic Republic's internal waters and territorial sea on 3 July 1988, and at other times discussed herein, violated the Islamic Republic's sovereignty and the principle of non-intervention under Articles 1 and 2 of the Chicago Convention and general and customary international law.

Tenth, the United States is under a duty immediately to cease and refrain from all such conduct as may constitute breaches of the foregoing legal obligations.

Eleventh, the United States is under an obligation to make reparations to the Islamic Republic for all of the violations of its international obligations mentioned above, and bearing in mind the criminal nature of the offences, in a sum to be determined by the Court at a subsequent stage of the proceedings. The Islamic Republic reserves the right to introduce and present to the Court in due course a precise evaluation of these reparations owing by the United States.

The Hague
24 July, 1990

(Signed) ________________

Mohammad K. Eshragh
Agent of the Islamic Republic
of Iran

LIST OF DOCUMENTARY EXHIBITS[1]

Exhibit	
1	Convention on International Civil Aviation of 1944 as amended (the Chicago Convention).
	Protocol relating to an amendment to the Convention on International Civil Aviation (Article 3 bis).
	Annexes 2, 11 and 15 to the Convention on International Civil Aviation.
2	Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (the Montreal Convention).
3	Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran of 1955.
4	Report of ICAO Fact-Finding Investigation (Appendix to C-WP/8708).
5	Act of 15 July 1934 on the Territorial Waters and the Contiguous Zone of Iran. Copy of the document in Farsi. Translation.
	Executive Regulation of Conditions of the Passage and Stopovers of Foreign Warships in Iranian Waters and Ports of 29 August 1934. Copy of the document in Farsi. Translation.
	Act of 12 April 1959 Amending the Act of 15 July 1934 on the Territorial Waters and the Contiguous Zone of Iran. Copy of the document in Farsi. Translation.
	Iranian Décret-Loi of 21 July 1973. Copy of the document in Farsi. Translation.
6	List of Passengers and Crew on board flight IR 655.

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[1] Not reproduced. *[Note by the Registry]*

7	Hearing before the Committee on Armed Services of the United States Senate held on 8 September 1988 (Senate Hearings).
8	Extracts from Weinberger, *Fighting for Peace*.
9	Extract from *The New York Times*, 13 January 1986.
	Page 41, Department of State Bulletin No. 2108, March 1986.
10	Extracts from Hearings before the Defense Policy Panel of the Committee on Armed Services, House of Representatives, held on 3 and 4 August, 9 September and 6 October 1988 (House Hearings).
11	Address of Vice-President Bush before the United Nations Security Council on 14 July 1988.
12	Extract from Hearings before the Committee on Foreign Affairs, House of Representatives, held on 19 May 1987.
13	State Department White Paper "Iran Air 655: Steps to Avert Future Tragedies" by R. S. Williamson. Current Policy No. 1092.
14	Transcriptions of texts of United States Notices to Airmen (NOTAMs) of January 1984 and September 1987.
15	ICAO working paper C-WP/8644 dated 8 July 1988.
	Addendum No. 1 to C-WP/8644 dated 12 July 1988.
16	Pages 16 to 23 of *Aviation Week and Space Technology*, 11 July 1988.
17	Page 64 of *Jane's Defence Weekly*, 16 July 1988.
18	Telex from the Administrator of the Islamic Republic's Civil Aviation Organization, dated 17 April 1989.
19	Protests by the Islamic Republic to the United States through its Interests Section at the Embassy of the Democratic and Popular Republic of Algeria, dated 23 January 1990.

20 Telex from the Administrator of the Islamic Republic's Civil Aviation Organization, dated 31 July 1989.

21 Protests by the Islamic Republic to the United States through its Interests Section at the Embassy of the Democratic and Popular Republic of Algeria, dated 15 February 1984, 16 March 1984, 28 March 1984 and 6 July 1989.

22 Page 8 of *Flight International*, 16 July 1988.

23 Pages 87 to 89 and 92 of *Proceedings*, September 1989.

24 Extract from *The International Herald Tribune*, 5 July 1988.

25 Extract from *The International Herald Tribune*, 9 July 1988.

26 Extract from *The International Herald Tribune*, 4 July 1988.

27 Extract from *Kayhan International*, 21 November 1988.

28 Pages 72 to 74, 76 and 78 to 79 of *Proceedings/Naval Review*, May 1989. "The Vincennes Incident" by Norman Friedman.

29 Page 60, United States Department of State Bulletin, July 1987.

30 Telex from the Islamic Republic's Vice-Minister of Roads and Transportation dated 3 July 1988.

31 Second telex from the Islamic Republic's Vice-Minister of Roads and Transportation dated 3 July 1988.

32 Letter from the Minister for Foreign Affairs of the Islamic Republic dated 3 July 1988.

33 Telex from the President of the ICAO Council dated 4 July 1988.

34 Letter from the Islamic Republic's Representative at ICAO dated 7 July 1988 and attachments.

35 ICAO working paper C-WP/8643 dated 7 July 1988.

36 ICAO working paper C-WP/8645, "Technical Aspects of the Shooting Down of Iranair Flight 655 by US Naval Forces" dated 12 July 1988.

37 Minutes of the First Meeting of the Extraordinary Session of the ICAO Council on 13 July 1988 (ICAO document C-Min. EXTRAORDINARY (1988)/1) dated 14 July 1988.

38 Summary of the Second Meeting of the Extraordinary Session of the ICAO Council on 14 July 1988 (ICAO document C-DEC EXTRAORDINARY (1988)/2) dated 14 July 1988.

39 Telex from the Administrator of the Islamic Republic's Civil Aviation Organization dated 19 July 1988.

40 Official Summary of discussion at informal meeting of ICAO in Paris on 6 October 1988.

41 Minutes of the 8th meeting of the Air Navigation Commission on 9 February 1989 (ICAO Document AN. MIN. 120-8) dated 17 February 1989.

42 ICAO working paper C-WP/8718 dated 1 December 1988.

43 Summary of the Fourteenth Meeting of the ICAO Council, 125th Session, on 7 December 1988 (ICAO document C-DEC 125/14) dated 7 December 1988.

44 Minutes of the Thirteenth Meeting of the ICAO Council, 125th Session on 7 December 1988 (ICAO Document DRAFT C-Min 125/13 (closed)) dated 23 January 1989.

45 Minutes of the Twelfth Meeting of the ICAO Council, 125th Session on 5 December 1988 (ICAO Document DRAFT C-Min. 125/12) dated 23 January 1989.

46 Minutes of the 6th Meeting of the Air Navigation Commission on 2 February 1989, (ICAO Document AN. MIN. 120-6) dated 21 February 1989.

47 ICAO working paper C-WP/8803, dated 2 March 1989.

48 Minutes of the Eighteenth Meeting of the ICAO Council, 126th Session on 13 March 1989 (ICAO Document DRAFT C-Min 126/18) dated 27 June 1989.

49 Minutes of the Nineteenth Meeting of the ICAO Council, 126th Session, on 5 March 1989 (ICAO document DRAFT C-Min 126/19) dated 24 July 1989.

50 Summary of the Twentieth Meeting of the ICAO Council, 126th Session, on 17 March 1989 (ICAO Document C-DEC 126/20) dated 20 March 1989.

51 ICAO Council Resolution Concerning Israeli Attack on Libyan Civil Aircraft dated 4 June 1973.

52 Resolution Adopted by the ICAO Council on 6 March 1984.

53 Page 23 of ICAO Annual Report for 1989, Document 9530 - Supplement (July 1989).

54 United States Memorandum on the Application of International Law to Iranian Foreign Exchange Regulations dated 15 February 1984.

United States Memorandum on the Application of the Treaty of Amity to Expropriations in Iran dated 13 October 1983.

United States Department of State, Treaties in Force, 1988/1989.

55 Pages 22 and 23 of ICAO Document C-Min. EXTRAORDINARY (1983) 11.

Draft Amendment to the Convention on International Civil Aviation, ICAO Assembly, 25th Session (Extraordinary). ICAO Document A25-WP/3 dated 28 November 1983.

56 Diplomatic Notes to the Union of Soviet Socialist Republics from the United States dated 12 September 1983.

57 United States House-Senate Joint Resolution 353 condemning the Soviet Criminal Destruction of the Korean Civilian Airliner dated 15 September 1983.

58 Pages 63-67, 84-85 of Minutes of the Ninth Meeting of the ICAO Council on 16 October 1985 (ICAO Document C-Min. 116/9 and 116/11).

59 Extracts from the ICAO Report of the Third Middle East Regional Air Navigation Meeting

in Montreal on 27 March to 13 April 1984 (ICAO Document 9434 MID/3).

60 Statement of the Islamic Republic on signing the 1982 United Nations Convention on the Law of the Sea.

61 Third Middle East Regional Air Navigation Meeting, (ICAO working paper MID/3-WP/108) dated 5 April 1984.

62 Document concerning settlement of claims between the United States and Iraq arising out of the attack on the USS Stark, from 83 A.J.I.L. (1989) pages 561 to 564.

63 Transcript of extract from *The New York Times*, 6 September 1983.

64 Transcript of extract from *The Washington Post*, 23 April 1990.

65 U.S. trade embargo legislation.

66 Letter from the Embassy of Switzerland dated 12 July 1989.

67 Certification.

APPENDIX

Analysis of the ICAO Report

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